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CASES DETERMINED

IN THE

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MEMORANDA.

Mr. Chief Justice WINSLOW took no part in the decision of the cases reported in this volume except those appearing on pages 147–154, 211–222.

Mr. Justice KERWIN took no part in the decision of the cases reported in this volume except those appearing on pages 211–222, 565–567.

Mr. Justice ESCHWEILER took no part in the decision of the cases reported in this volume on pages 388–485, 515–646.

Mr. Justice JONES took no part in the decision of the cases reported in this volume on pages 1–387, 400–406, 486–514.

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CASES DETERMINED

AT THE

January Term, 1920.

BECKER, Appellant, vs. WEST SIDE DYE WORKS, Respondent.

May 7—June 1, 1920.

Automobiles: Collision with pedestrian: Negligence of driver of automobile: Violation of statute: Evidence: Contributory negligence: Degree of care required of person in street: Trial: Instructions upon special verdict: Appeal: Prejudice of jury: New trial: Impeaching verdict.

1. In an action by plaintiff, who was struck by defendant's automobile truck as he passed in front of a street car from which he had alighted, an instruction that the operator of an automobile has the right to assume that every person whom he meets will exercise ordinary care and caution, under the circumstances, to avoid injury, and will not expose himself to danger, "but will, as is his duty, exercise ordinary care to keep a careful lookout," is not objectionable as imposing on plaintiff an absolute duty to keep a careful lookout.
2. Where a special verdict is submitted, the court should give specific instructions applicable to the particular question, so that there can be no doubt as to which question the instructions apply.
3. The failure of the driver of a motor vehicle to observe the law of the road in passing a street car does not absolve a pedestrian passing such car from the duty to exercise ordinary care for his own safety; and the evidence in this case is *held* to warrant a finding that he was guilty of negligence precluding recovery.
4. Where no prejudice appears in a verdict, the fact that one of the jurors signed an affidavit that other jurors referred to plaintiff as a Jew, a crook, and a liar cannot form the basis for a reversal or for a new trial.
5. An affidavit, on a motion for a new trial, that one of the jurors would not have consented to a special finding of contributory negligence if he had known that it barred recovery, cannot be considered.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover damages for a personal injury caused by a collision with an automobile driven by one Kimball, an employee of the defendant. On February 20, 1919, at about 11:45 a. m., plaintiff alighted at the intersection of Twenty-fourth street and Lisbon avenue in Milwaukee from the right front door of a street car on which he had been a passenger. The stop was made on the further side of the street intersection. After alighting, plaintiff started to cross the street in front of the street car, and as he had proceeded four or five feet beyond the car he was struck by, or ran into, the defendant's automobile, which was passing on the left side of the street car and in the direction in which the street car was going. Ordinary and gross negligence on the part of the defendant were alleged in separate counts in the complaint, but the appeal concerns only the charge of ordinary negligence.

The jury found (1) defendant's driver, Kimball, was guilty of negligence in operating the automobile as it approached and collided with the plaintiff; (2) such negligence was the proximate cause of plaintiff's injury; (3) Kimball did not pass the street car on which plaintiff had been a passenger while that car was actually taking on or discharging passengers; (5) negligence on plaintiff's part proximately contributed to produce his injury; and (6) damages $2,500. In view of finding 3, no answer to question 4 was required and none was made. Upon such special verdict the court awarded judgment for defendant, and the plaintiff appealed.

Morris Stern, attorney, and *A. W. Richter,* of counsel, both of Milwaukee, for the appellant.

Raymond J. Cannon of Milwaukee, for the respondent.

VINJE, J. Plaintiff's assignments of errors are that (1) the court erred in instructing the jury with reference

to the duty to look and listen for the approach of vehicles, and (2) in refusing to grant a new trial because of the bias and prejudice of the jury.

It is apparent that the first error assigned can become material only in case it relates to the question of contributory negligence, because all other questions were answered favorably to the plaintiff. The instruction complained of is as follows:

"On the other hand, every operator of an automobile has the right to assume and act upon the assumption that every person whom he meets on the street will exercise ordinary care and caution, according to the circumstances, to avoid injury, and that he will not expose himself to danger, negligently or recklessly, but will, as is his duty, exercise ordinary care to keep a careful lookout, to listen for approaching vehicles, to avoid a collision, and if he sees or hears a vehicle before it strikes him, or by the reasonable use of his senses could see or hear it in time to avoid the injury, that he will promptly, in the exercise of ordinary care, attempt to avoid the injury."

The particular language thereof criticised was the expression therein "but will, as is his duty, exercise ordinary care to keep a careful lookout, to listen for approaching vehicles, to avoid a collision." It is claimed that this put upon plaintiff the absolute duty of keeping a careful lookout for vehicles and that he must anticipate that vehicles will violate the law and approach from directions where they have no right to be. We think counsel err in saying that it imposes an absolute duty to keep a careful lookout. The instruction imposes upon the person referred to therein only the duty to exercise ordinary care in the use of his eyes and ears. It does not impose an absolute duty to keep a careful lookout, but only the duty to exercise ordinary care in respect thereto.

It is claimed by respondent that the instruction was not intended to apply to the question relating to contributory negligence but to the question of the negligence of the defendant, the driver of the vehicle. Whose contention is

correct is not easy to determine, because the instruction complained of was included with others covering several printed pages, all of which were prefaced by the statement on the part of the court that "In connection with questions numbered 1 and 2 and 4 and 5 you are instructed," etc. Question 1 related to defendant's negligence, questions 2 and 4 to proximate cause, and question 5 to contributory negligence. It is evident, therefore, that the instructions could not apply to all the questions, and so the jury were left to determine for themselves to which question any particular instruction referred. This they should not be compelled or permitted to do. This court has frequently admonished trial courts, when a special verdict is submitted, to give specific instructions applicable to the single question then instructed upon, so that there can be no doubt as to which question the instruction applies. *Kohler v. West Side R. Co.* 99 Wis. 33, 74 N. W. 568; *Schaidler v. C. & N. W. R. Co.* 102 Wis. 564, 78 N. W. 732; *McDermott v. Jackson,* 102 Wis. 419, 78 N. W. 598; *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921; *Rhyner v. Menasha,* 107 Wis. 201, 83 N. W. 303; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Schrunk v. St. Joseph,* 120 Wis. 223, 97 N. W. 946; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 113 N. W. 738; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 117 N. W. 1007. While we think it more probable that the jury understood this instruction to apply to the question of defendant's negligence, still for the purposes of a decision we shall assume that they understood it to apply to the question of plaintiff's contributory negligence, but for reasons already stated such instruction is correct applied to such question. Hence no error was committed by the trial court in this case in giving instructions susceptible of application to several questions. But such practice should not be followed because it is confusing

to the jury and may often result in prejudicial error. The court should clearly inform the jury to which question or questions *each* instruction applies.

It is further urged that, since plaintiff was not bound to anticipate that a vehicle would come from a direction or on a side not authorized by law, he was under no duty to look and listen. This contention is negatived in *Zimmermann v. Mednikoff,* 165 Wis. 333, 162 N. W. 349, where it is held that a failure by one party to obey the law of the road does not exonerate the other from the exercise of ordinary care for his own safety.

There is evidence to show that plaintiff neither looked nor listened as he emerged from in front of the car and had a field of vision to the left. It is true that his safety zone there was only about three and a half feet, but the jury had a right to conclude that it was negligence not to look or listen under the circumstances, and that had he done so he could have stepped back a foot or so and avoided the collision, as did the young lady immediately following him. Where there is competent, credible evidence to sustain a verdict, which is also, as in this case, in accord with the facts as shown by practically all the evidence, this court will not disturb it. Had plaintiff looked to the rear as he came beyond the car he could have seen defendant's truck and have avoided it. He was struck because he did not look when it was his duty to do so. There is also evidence that the driver sounded his horn at least twice before plaintiff was hit, and in time to have enabled him to have avoided the injury had he looked. When the driver saw the plaintiff he put on the brakes and the truck skidded on the snow and plaintiff was struck by the center or rear end thereof, and some witnesses testify that plaintiff ran into the truck.

We can discover no perversity or prejudice in the verdict, and the affidavit of a juror to the effect that other jurors referred to plaintiff as a Jew, a crook, and a liar cannot

form the basis for a reversal or for a new trial. Nor can the affidavit to the effect that the jurors did not know the legal effect of the answer to question 5 be considered. It is stated in the affidavit that had the juror known that a finding of contributory negligence barred recovery he would not have consented to it. Verdicts cannot be so impeached. *Dishmaker v. Heck,* 159 Wis. 572, 150 N. W. 951; *Holub v. Cootware,* 169 Wis. 176, 170 N. W. 939.

By the Court.—Judgment affirmed.

ZOLESKY, Respondent, vs. BRIGGS LOADING COMPANY, Appellant.

May 7—June 1, 1920.

Explosives: Erection of testing pits for rifle grenades: Negligence: Injury to boy finding unexploded grenade: Liability.

1. In an action against a rifle-grenade loading company for injuries to a boy when a grenade found in a testing pit by another boy and given to him exploded, the erection of the pit, into which government inspectors shot grenades after inserting detonators, is not the proximate cause of the injury, which resulted not from the character of the testing pit, but from the negligence of the inspectors in failing to collect unexploded grenades.
2. Where the loading company, by its contract with the government, was obligated to allow the latter to take from manufactured grenades a sufficient number for testing purposes, which grenades, when selected, ceased to be under control of the company, any negligence in regard to them by government inspectors was not attributable to the company.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

Personal injury. The plaintiff is the father of one Roland Zolesky, a boy eight years of age. The defendant is a corporation engaged in the manufacture of rifle grenades. The complaint alleges that during the summer and fall of 1918 and down to the 6th day of December, 1918,

the defendant manufactured grenades, and during the process of manufacture had such grenades tested by firing same from a rifle; that some of the grenades so fired did not explode upon striking the mark or target, and were permitted, through the carelessness or negligence of the defendant, to remain upon its premises; that the said grenades are explosive, and of such a nature as to be attractive to young children and an inducement for them to pick them up and carry them away to play with, all of which the defendant knew, or in the exercise of ordinary care should have known; that in the month of December, 1918, some school children while upon the premises carried away grenades which were scattered about the unguarded premises of the defendant, and one of said grenades was given to Roland Zolesky, who exploded the same, injuring his right hand and otherwise injuring himself. This action is brought to recover the value of lost services.

The jury by special verdict found (1) that the defendant was guilty of negligence in erecting and permitting the testing pit on the east side of the river to be used for the purpose of testing grenades containing detonators; (2) that such negligence was the proximate cause of Roland's injuries; (3) (changed by the court from "Yes" to "No") that the defendant did not have knowledge that the unexploded grenade had been left in the firing pit on the east side of the river; (4) that in the exercise of ordinary care the defendant should have known that an unexploded grenade had been left in the firing pit on the east side of the river; (5) that the Moore boy did not know at the time he gave to Roland Zolesky the grenade in question that the detonator was explosive; (6) that Roland Zolesky was not guilty of contributory negligence; and (7) assessed the damages at $2,000.

After verdict there were the usual motions. The plaintiff had judgment for the damages as found by the jury, from which the defendant appeals.

For the appellant there were briefs by *Burr J. Scott,* attorney, and oral argument by *Lawrence A. Olwell,* both of Milwaukee.

Raymond J. Cannon of Milwaukee, for the respondent.

ROSENBERRY, J. The conclusion at which we have arrived does not require us to consider whether or not the doctrine of the *Turntable Cases* is applicable in this case, as claimed by plaintiff. The undisputed facts are that the defendant was engaged in assembling and filling rifle grenades under a contract with the United States government. It did not manufacture the grenades, but assembled grenade parts manufactured by different plants, and loaded the grenades with TNT. These grenades when assembled and loaded were harmless until detonators were put in. The defendant company did not manufacture or handle detonators. After the grenades were assembled and loaded they were packed in boxes. Before shipment government inspectors were sent to the defendant's plant for the purpose of testing the grenades. Originally the grenades were sent to the government proving grounds located near Aberdeen, Maryland. Because of the necessary delays the defendant, at the request of the government, erected bomb-proofs on opposite sides of the Milwaukee river. The grenades were fired from the bomb-proof on the west side of the river into the bomb-proof on the east side of the river. After the erection of this proving ground government agents came to the defendant's plant, opened the boxes containing the grenades, selected therefrom a specified number, which were taken to the proving grounds, detonators were inserted, and the grenades fired across the river into the bomb-proof on the east side.

It was undisputed that it was the duty of the government inspectors and a part of the work of inspection and testing to collect the unexploded grenades, or "duds," as they were called. The defendant company had nothing to

do with the selection of the grenades for testing purposes, with the insertion of the detonators, or with the firing of the grenades into the bomb-proof on the east side of the river, except that occasionally officers of the company were present, witnessed these tests, and occasionally fired the rifle as a matter of curiosity or experience. There is no proof in the record to sustain the finding of the jury, in answer to the third question, that the defendant company had actual knowledge of the unexploded grenades which were left in the bomb-proof on the east side of the river through the negligence of the government inspectors. The answer to question 3 was properly changed by the trial court from "Yes" to "No."

While the complaint alleged that the grenades were permitted through the carelessness and negligence of the defendant to remain upon its premises, the plaintiff apparently abandoned that position upon the trial, for the only question of negligence submitted to the jury is as to the negligence of the defendant in erecting and permitting the testing pit on the east side of the river to be used for testing purposes. We do not perceive how the erection of this pit can be held to be the proximate cause of the injury. It is true that it was upon land which had been acquired by the city and county of Milwaukee for park purposes, but it was unoccupied, and was as appropriate for the use to which it was put as any site which could be obtained in a settled community. Had the plaintiff's son been injured by a flying grenade, a different question would be presented. Here the injury resulted not from the character of the bomb-proof, but from the negligence of the inspectors in failing to collect the unexploded grenades as they were required to do by their orders.

It is argued that, because the title to the goods did not pass until the test had been made, the unexploded grenades remained the property of the defendant and it was therefore liable. We regard this argument as unsound. Under

the contract with the government, the government had a right to take from the manufactured grenades a sufficient number for purposes of making a test. To that extent and for that purpose such grenades, so selected, ceased to be the property of the defendant. Certainly from that moment they ceased to be under the control of the defendant, and if thereafter they were negligently left in an exposed position, it was not through the negligence of the defendant but through the negligence of the inspectors. The fact that as a matter of convenience and for purposes of expediting the business of furnishing the grenades the defendant company erected the proving grounds at the request of the government, does not make it responsible for the negligent acts of the government inspectors in connection with the use of the grounds.

By the Court.—Judgment reversed.

FALK, Respondent, vs. DEVENDORF, Appellant.

May 7—June 1, 1920.

Landlord and tenant: Statute of frauds: Oral lease for longer than one year: Oral agreement to execute lease: Validity: Possession of tenant: Specific performance of void lease: Improvements by tenant: Evidence: Statement of former owner: Admissibility in evidence.

1. Where an oral lease was made in August for one year, with the privilege of three years, to begin from the following September 1st, so much of the arrangement as gave the tenant the right of possession at the specified rental for the term of one year was binding and effective; but so much of the agreement as purported to grant the tenant any right to possession after the expiration of the first year was within the statute of frauds.
2. The oral agreement of the landlord to subsequently execute a writing to give validity to his oral three-year lease was void.
3. The tenant having a three-year oral lease, his taking possession of the premises was referable to the rights he acquired and which were acquiesced in by his landlord under that portion of his lease which was valid as a lease for one year.

4. The fact that the tenant under the void oral lease did some electric wiring in the premises does not show a substantial improvement to the premises themselves, of benefit to the owner, or the doing of something outside of the mere agreement for leasing, such as would bring it within any of the rules warranting specific performance of the void oral agreement.
5. A written statement by the former owner of the premises, declaring the terms of the oral agreement under which the defendant tenant claimed, not signed until after such owner had sold to plaintiff, was not binding on plaintiff.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court affirming a judgment of unlawful detainer of the civil court of Milwaukee county.

In August, 1918, the defendant orally leased the upper flat of a double-flat building, then owned by one Broecker, for $27 per month for a term of one year with the privilege on defendant's part of extending his possession for two years more at the same rate.

On September 14, 1918, defendant took possession of and did some electric wiring in the flat, the nature, extent, and expense thereof not being disclosed in the record.

The plaintiff purchased the premises of Broecker in January, 1919, knowing at such time of defendant's occupancy and without making inquiry of him as to what contract he might have with said Broecker.

May 1st plaintiff raised the rent of said upper flat to $30 per month. Defendant paid rent to the plaintiff after January 1st and after the raise to $30. On May 2d, at the request of defendant, the former owner, Broecker, signed a written statement to the effect that the lease made by Broecker's wife on his behalf in August, 1918, was for the term of one year with the privilege of three years and beginning September 1, 1918, with rent at the rate of $27 per month payable in advance.

In July plaintiff gave defendant notice that he desired

to terminate the lease on September 1st. About the same time defendant gave written notice to plaintiff of defendant's election to extend the lease for two years from September 1st.

Upon defendant's refusal to remove from the premises after September 1st plaintiff brought an action for unlawful detainer in the civil court and was awarded a judgment of restitution of the premises therein. From such judgment the defendant appealed to the circuit court, where the said judgment was affirmed. From the judgment of the circuit court defendant has appealed.

For the appellant the cause was submitted on the briefs of *Samuel Wright* of Milwaukee.

George A. Affeldt of Milwaukee, for the respondent.

ESCHWEILER, J. The defendant contends that under undisputed testimony that at the time of the making of the oral contract in August, 1918, it was further agreed between defendant and the then owner of the premises, acting through his wife as agent, that such contract would be put in writing at any time thereafter at defendant's request, it then became a valid and binding contract as though reduced to writing and became equally binding and enforceable as against the plaintiff, who bought the real estate chargeable with notice of such right in the defendant then in possession. He also contends that in any event his entering into possession of the premises in reliance upon the oral agreement to lease and to reduce such agreement to writing, together with his doing the electric wiring in the premises and continuing in possession thereof and paying rent, was such part performance as takes the oral promise out of the statute of frauds.

So much of the arrangement between the defendant and Broecker in August, 1918, as purported to give defendant the right of possession at the specified rental for the term of

one year is conceded by plaintiff and so treated by the courts below as being binding and effectual. So much, however, of such agreement as purports to grant defendant any right to possession after the expiration of such first year is manifestly within the statute of frauds (secs. 2302, 2304, Stats.), and was correctly so held. 20 Cyc. 214; *Hand v. Osgood,* 107 Mich. 55, 64 N. W. 867; *Beller v. Robinson,* 50 Mich. 264, 15 N. W. 448; *Osgood v. Shea,* 86 Neb. 729, 126 N. W. 310, 42 L. R. A. N. S. 648 and note.

The oral agreement for the subsequent execution of a writing which would give validity to that which without such writing is void under the statute of frauds, was likewise void. *Yates v. Martin,* 2 Pin. 171; 20 Cyc. 229; *Hanson v. Marion,* 128 Minn. 468, 151 N. W. 195. To hold otherwise would pave the way for a practical abolishment of such provision in the statute of frauds.

The taking possession by the defendant in this case is properly referable to the rights he acquired and which were acquiesced in by plaintiff under the valid lease for one year. *Osgood v. Shea, supra; Brodner v. Swirsky,* 86 Conn. 32, 84 Atl. 104, 42 L. R. A. N. S. 654.

Neither did the fact that the defendant did some electric wiring in the premises present a situation showing a substantial improvement to the premises themselves of benefit to the then owner, or of the doing of something outside of the mere agreement for leasing such as would bring it within any of the rules which warrant a court of equity in decreeing specific performance of an oral agreement void under the statute, recognized in such cases as *Booher v. Slathar,* 167 Wis. 196, 167 N. W. 261, and those therein cited; *Harrell v. Sonnabend,* 191 Mass. 310, 77 N. E. 764.

The written statement by the former owner, Broecker, declaring the terms of the oral agreement in August, but which was not signed until after plaintiff had purchased from Broecker, could not, even were it of force between defend-

ant and Broecker, be binding on plaintiff, the subsequent purchaser. *Emery v. Boston T. Co.* 178 Mass. 172, 59 N. E. 763.

By the Court.—Judgment affirmed.

TODOROVIC, Respondent, vs. HIRSCHBERG, Appellant.

May 7—June 1, 1920.

Courts: When appellate court acquires jurisdiction: Civil court of Milwaukee county: Perfection of appeal by payment of fees: Jurisdiction of circuit court: Dismissal of appeal: Costs on appeal to supreme court.

1. An appellate court acquires no jurisdiction until the jurisdiction of the lower court is superseded, which occurs only when everything necessary to perfect the appeal has been done.
2. Where an appeal from the civil court of Milwaukee county to the circuit court had not been perfected by the payment of the fees required by ch. 320, Laws 1913, the circuit court had no jurisdiction and there was no appeal pending in it upon which an order of dismissal could operate, so that an order dismissing the appeal was a nullity.
3. The appeal from the order of the circuit court being entirely frivolous, though the order is reversed because the circuit court had acquired no jurisdiction, appellant will recover no costs.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The appeal is from an order of the circuit court dismissing defendant's appeal from the civil court of Milwaukee county.

For the appellant the cause was submitted on the brief of *Horace B. Walmsley* of Milwaukee.

Frank E. Waldron of Milwaukee, for the respondent.

OWEN, J. Plaintiff recovered a judgment in the civil court of Milwaukee county. Defendant served a notice of appeal therefrom to the circuit court for Milwaukee county,

but failed to pay to the clerk of the civil court certain fees necessary to be paid in order to perfect the appeal, by virtue of ch. 320, Laws 1913, and the clerk of the civil court never transmitted the record to the circuit court. Plaintiff made a motion to dismiss the appeal in the circuit court, which motion was granted without costs. Defendant brings this appeal from the order of the circuit court dismissing the appeal from the civil court, claiming that the circuit court had no jurisdiction of the case and was without power to dismiss the appeal.

It is clear that the circuit court had no jurisdiction of the case, for the reason that the appeal from the civil court had not been perfected by the payment of the fees required by law. In this respect the case is unlike *Bruins v. Downey,* 45 Wis. 496; *Allard v. Smith,* 97 Wis. 534, 73 N. W. 50, and *S. C.* 120 Wis. 22, 97 N. W. 510. In those cases all requisite fees had been paid and the appeal perfected, but the justice of the peace had failed to return the record to the circuit court. It was intimated in those cases that under such circumstances the circuit court had power to dismiss the appeal. It is manifest that an appellate court does not acquire jurisdiction of a case until the jurisdiction of the lower court is superseded. The lower court retains jurisdiction of the case until everything necessary to perfect the appeal has been done. In the instant case the requisite fees not having been paid to the clerk of the civil court, that court did not lose jurisdiction of the case and the circuit court acquired none. There was therefore no appeal pending in the circuit court upon which its order of dismissal could operate, and the order was a nullity and must be reversed.

We are at a loss, however, to understand the motive prompting this appeal. If, as appellant here contends, the circuit court acquired no jurisdiction of the case, the order dismissing the appeal resulted in no injury to him. It is stated in the brief of appellant's counsel that the appeal was

dismissed with costs. Such, however, is not the case, and the appellant has not the excuse of relieving himself from ordinary motion costs in justification of this appeal. The appeal is entirely frivolous and, while the order is reversed for reasons stated, the appellant should recover no costs.

By the Court.—Order reversed. No costs to be taxed. Appellant to pay the clerk's fees in this court.

TINGLEY, Respondent, vs. RICHTER and wife, Appellants, and MILWAUKEE BUILDING SUPPLY COMPANY and another, Respondents.

May 7—June 1, 1920.

Mechanics' liens: Release of lien: Construction: Defective material repaired and used: Lien of materialman: Appeal: Findings not excepted to: Effect on appeal.

1. Where no exceptions are taken to findings of fact made by the trial court, they must be treated as verities on appeal.
2. The alleged release by a subcontractor on a building whereby he "hereby waives his lien upon the above said premises for the said amount but reserves his rights under the contract for the balance of the amount due under his contract," released the lien only to the extent of the amount paid to the subcontractor.
3. In an action to foreclose mechanics' liens, the evidence is *held* to show that a materialman's written release was intended by the parties to release its lien only to the extent of the amount the owner would pay on a sixty-day note previously given to the materialman.
4. Where defects in windows furnished by a materialman were remedied by the builder before they were used and the cost deducted from the price, the owner is liable to the materialman in an action to foreclose his lien, on the theory that after repairing the defects the windows were accepted.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action brought by three subcontractors to

foreclose a mechanic's lien against a building owned by defendants *Richter.*

The complaint alleged that defendants *Richter* entered into a contract with Lex Brothers as principal contractors for the construction of an apartment house; that plaintiff as subcontractor furnished the cut stone for the erection of this building to the value of $800; that all provisions of the mechanic's lien statute were complied with by plaintiff; that $250 has been paid and that $550 is due from the principal contractors. The answer of defendants *Richter* alleged that whatever mechanic's lien plaintiff had upon the premises was waived by a written release.

The answer and cross-complaint of defendant *Leo Rehm* alleges that he was employed as subcontractor by Lex Brothers to furnish the window frames and did furnish such window frames for the sum of $277.62; that he has complied with the requirements of the mechanic's lien statute; that he has been paid $50, and that there is due from the principal contractors the sum of $227.62. The answer of defendants *Richter* to the cross-complaint of *Rehm* alleges that many of the frames to be furnished by defendant *Rehm* were not furnished at all, many were not completed, and many were improperly made; that whatever right *Rehm* may have had under the mechanic's lien statute has been released by an instrument in writing.

The answer and cross-complaint of defendant *Milwaukee Building Supply Company* alleges that it entered into a contract with Lex Brothers to furnish face and common brick for use in the building of defendants *Richter;* that under such contract they furnished brick on which there is a balance due of $1,157.60; that all requirements of the mechanic's lien statute have been met. The defendants *Richter* answer to this cross-complaint that the lien of the cross-complainant was released in writing upon payment of $1,500 and that the cross-complainant now has no lien.

A stipulation was made by which the amount of the *Mil-*

waukee Building Supply Company's claim was reduced to $807.60.

The action was tried to the court. The court held that the instruments introduced by defendants *Richter* do not release or waive the lien rights of the respective parties, and that *Rehm* at no time intended to execute a release or waiver of his lien rights and was misled into signing the alleged written release of his mechanic's lien by the defendant *Richter*.

Judgment was entered foreclosing the lien in favor of plaintiff in the sum of $614.63 and in favor of defendant *Milwaukee Building Supply Company* in the sum of $875.77, and in favor of defendant *Leo Rehm* in the sum of $199.60; and for costs to plaintiff of $134.05, to defendant *Milwaukee Building Supply Company* $46.50, and to defendant *Leo Rehm* $25.90. Appeal is taken from this judgment.

A. W. Richter of Milwaukee, for the appellants.

George A. Affeldt of Milwaukee, for the respondent *Tingley*.

Fred Doering of Milwaukee, for the respondent *Rehm*.

For the respondent *Milwaukee Building Supply Company* there was a brief signed by *Fish, Marshutz & Hoffman*, attorneys, and *G. R. Hoffman*, of counsel, all of Milwaukee, and the cause was argued orally by *Irving A. Fish*.

SIEBECKER, J. An examination of the record discloses that no exceptions were taken to the findings of fact made by the trial court. The findings must therefore be treated as verities in the case. *Statkawicz v. Laguna*, 155 Wis. 304, 143 N. W. 677, 144 N. W. 1133.

The pleadings and findings in the case are sufficient to sustain the judgment under the statutes providing for subcontractors' liens for materials furnished and used in the erection of the building in question, if the trial court properly construed the alleged writings which appellant claims

are releases of respondents' liens as subcontractors. The alleged release by plaintiff contains the following provision:

"The said undersigned subcontractor hereby waives his lien upon the above said premises for the said amount [$250], but reserves his rights under the contract for the balance of the amount due under his contract."

The terms of this provision clearly released the lien only to the extent of the sum paid by appellant when the paper was signed, namely, $250, and the latter part of the clause in express terms declares that a right of lien on the premises shall remain for the unpaid balance. The trial court correctly held that this alleged release of lien did not constitute a release of the right of lien for the amount still due plaintiff as subcontractor.

The court finds that the owner, *Richter,* after the construction of the apartment building had been commenced, obtained a loan of $20,000 and gave a mortgage to secure the payment of this loan on the premises on which the apartment building was in process of construction. It appears that the note given by *Richter* to the *Building Supply Company* for $1,500, which when paid was to apply on the company's claim for material furnished by it, was only payable out of funds *Richter* obtained on the mortgage. The transaction embraced in the alleged release, which was executed by the *Supply Company* on the day the above note was given, was manifestly intended by the parties to accomplish the object of reducing the builder's lien to the amount advanced out of the mortgage funds, and such payment was to inure to the benefit of the mortgage by enhancing the mortgage security as a subsequent mortgage lien on the premises. Viewing the alleged written release of the *Supply Company* made May 25, 1916, under these surrounding facts, it is manifest that the trial court is amply sustained in its conclusion that this release was intended by the parties to release the *Supply Company's* subcontractor's lien for no more than the amount *Richter* would pay on the sixty-day

note given by him to the company, and the trial court properly held that the *Supply Company* is entitled to enforce a lien for the balance due on its claim for material furnished. The contention that the subcontractor, *Rehm,* is not entitled to judgment in his favor as awarded must be denied because the findings of fact on his claim are that the defects in the window frames furnished by claimant were remedied by *Richter,* the builder, before they were used by him in the building, and the cost thereof deducted from the price. The effect of this finding is that the frames, after repairing their defects, were accepted by *Richter.*

The court also found as a fact that *Rehm,* through misrepresentation by the builder and his attorney, signed the alleged release believing it did not waive his right to a subcontractor's lien. Under this state of the record these findings must stand. We find no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

LINDEN, Appellant, vs. MILLER, Respondent.

May 7—June 1, 1920.

Automobiles: Res ipsa loquitur not applicable to "skidding" of automobile: Negligence: Unavoidable accident: Appeal: Submission of unnecessary question: Instructions: Harmless error.

1. The skidding of an automobile does not necessarily imply negligence, so that the doctrine of *res ipsa loquitur* is not usually applicable to a collision resulting therefrom.
2. The submission to the jury of the question whether an automobile collision was an unavoidable accident was harmless, the jury not only having found that the accident was unavoidable but that defendant was not negligent in operating his machine.
3. An instruction defining "unavoidable accident" is *held* not to have been prejudicial to plaintiff, though erroneously limiting such an accident to one free from human agency, and though in the last sentence of the instruction the court inadvertently omitted the word "unavoidable" before the word "accident."

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries sustained in an auto collision. January 1, 1917, at about 6 o'clock in the evening, plaintiff was riding in an automobile in a northwesterly direction on Prospect avenue and on the right-hand side thereof. The automobile was driven by her husband and was within a few feet of the east curb of the street when defendant's automobile, which was going in a southeasterly direction, skidded into plaintiff's and caused the injuries complained of. The alleged negligence of the defendant consisted in (1) driving at a rate of speed in excess of that permitted by law; (2) reckless operation of his car in view of the icy condition of the street; (3) driving to the left of the center of the street; (4) failing to have control of his machine; incompetency of the driver; and (6) failure to have the machine equipped with chains or other devices for controlling the same. The jury found (1) the defendant did not fail to exercise ordinary care in operating his automobile at or immediately prior to the happening of the collision; (3) the collision was due to an unavoidable accident; and (4) damages in the sum of $600. From a judgment in favor of defendant upon the special verdict the plaintiff appealed.

George A. Affeldt, attorney, and *Christian Doerfler,* of counsel, both of Milwaukee, for the appellant.

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Nathan Glicksman.*

VINJE, J. It appears from the evidence that defendant's car, a Super Six Hudson weighing about 3,500 pounds, was driven at a rate of from ten to fifteen miles an hour at the time it began to skid. Defendant's wife occupied the front seat with him. The rear seat was empty. When an icy spot was reached the rear end of the car began to slue to

the west and defendant in vain tried to turn the front end to the west. The result was that almost immediately his car skidded diagonally across the street, and, though he finally applied the brakes hard, he struck plaintiff's car with quite a crash, inflicting the injuries complained of.

Plaintiff argues that it was error to submit the third question as to whether the collision was due to an unavoidable accident, because there is absolutely no evidence in the case upon which a finding of unavoidable accident could be based. If it be true, as the defendant claims it was, that he was driving along near the center of the street at a moderate rate of speed when his car began to skid and that by the exercise of ordinary care he was unable to control it until it struck plaintiff's car, then the jury might well find that it was an unavoidable accident. Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not necessarily implying negligence. Hence plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine of *res ipsa loquitur* apply it must be held that skidding itself implies negligence. This it does not do. It is a well known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there. No negligence as a matter of law can be charged to the fact that defendant ran his car on Prospect avenue that day on a snowy and slippery roadway. Plaintiff also ran her car there, and she avers, and it is admitted, she was not negligent. Other cars were being run there that day, and it is a matter of common knowledge that cars are run all winter and in practically all kinds of weather upon city streets. So the jury were warranted in finding no negligence because of using the street under the circumstances. As a rule, in auto collisions the direct cause of the accident and the con-

trolling circumstances attendant thereon are usually not so within the control of a driver as to raise a presumption of negligence on his part. In other words, the doctrine of *res ipsa loquitur* does not usually apply to such accidents. *Klein v. Beeten,* 169 Wis. 385, 172 N. W. 736; *Williams v. Holbrook,* 216 Mass. 239, 103 N. E. 633. See valuable note to former case in 5 A. L. R. 1240, upon the subject of *res ipsa loquitur* as applied to automobile accidents, where the cases are collected and the rule as stated sustained by them.

It is next urged that the court erred in submitting the third question to the jury, as to whether the collision was due to an unavoidable accident, and that it also erred in instructing the jury relative thereto as follows:

"An unavoidable accident is defined to be an event happening unexpectedly from the uncontrollable operations of nature, without human agency. It is further defined and means an event that takes place without any one's foresight or expectation; an event from an unknown cause or an unusual or unexpected event from a known cause; a chance, or casualty; anything occurring unexpectedly or without known or assignable cause, or an event occurring without negligence. Whether an accident occurred does not depend on the exercise of reasonable care, nor is it prevented by the exercise of reasonable care."

It is true that the third question was not necessary for the determination of any issue raised by the pleadings or the evidence, but it no doubt appeared to the trial court when the evidence was all in that it presented a case where the jury might well come to the conclusion that the collision occurred without fault of either party, in which event it would be an unavoidable accident. The jury's answers to questions 1 and 3 are consistent, and we cannot perceive how they were misled by finding the same fact twice. At least it does not seem to us that plaintiff can complain of the fact that the jury were twice called upon to negative defendant's negligence in different ways. There was no claim of contributory negligence, hence a negative answer to question

3 would have contradicted the negative answer to question 1. So no error prejudicial to plaintiff resulted from the submission of the question.

We also regard the instruction complained of as more favorable to the plaintiff than to the defendant because it erroneously limits an unavoidable accident to one free from human agency. It need not be. Non-negligible human agency may give rise to an unavoidable accident. In the last sentence of the question the court no doubt inadvertently left out the word *unavoidable* before the word *accident,* and the jury must have understood that the court there also meant an unavoidable accident. That was the subject matter of the question and of the instruction and the jury must have so understood it. Thus construed we see no error prejudicial to plaintiff in the instruction, nor do we regard the verdict as perverse.

By the Court.—Judgment affirmed.

STRANGE, Respondent, vs. HARWOOD, Appellant.

May 7—June 1, 1920.

Appeal: Frivolous appeal to supreme court: Constitutional law: Vested right in rules of procedure: Advancement of hearing: Disposition of case.

1. Although defendant has the legal right, under sec. 3069, Stats., to appeal from an order sustaining a demurrer, he has no vested right in the rules of procedure regulating the manner and time of hearing appeals in the supreme court.
2. Where it is apparent from a mere inspection of the record that there is no merit in an appeal from an order sustaining a demurrer to the complaint, so that it must have been taken merely for delay, the supreme court can give early hearing on the appeal to secure to the parties the prompt justice guaranteed by sec. 9, art. I, Const., since sec. 2951, Stats., authorizing damages for delay caused by a frivolous appeal, does not limit the power of the supreme court to deal with matters properly before it.

3. Under sec. 3071, Stats., authorizing the supreme court, upon appeal from a judgment or order or upon a writ of error, to reverse, affirm, or modify the judgment or order, the court will not dismiss a frivolous appeal from an order overruling a demurrer to the complaint, but will summarily affirm the order on motion, without waiting to reach the case in ordinary procedure.

APPEAL from an order of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

This action was begun by the plaintiff to recover damages alleged to have been received as a result of the negligent conduct of the defendant in driving and operating his automobile upon the public highways in violation of the provisions of the laws of the state.

To the plaintiff's complaint the defendant demurred, and upon the hearing an order was entered overruling the demurrer, giving the defendant leave to answer within twenty days upon payment of $10 costs. The demurrer was upon the ground that it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action. The defendant appealed from the order, and the record was filed in this court February 21, 1920. On April 26, 1920, the plaintiff filed a motion in this court, first, to dismiss the appeal for the reason that upon the face of the record and by a mere inspection thereof it appears that the appeal is without merit and clearly frivolous; second, that the order appealed from be affirmed for the reason that it appears from the face of the complaint and upon mere inspection thereof that a cause of action was therein stated, and that the trial court did not err in overruling the general demurrer interposed; and third, that in the event that either of the foregoing motions is granted, immediate *remittitur* of the record to the trial court be directed. The motion was submitted by both parties upon briefs.

Francis S. Bradford of Appleton, for the appellant.

Bouck, Hilton, Kluwin & Dempsey of Oshkosh, for the respondent.

ROSENBERRY, J. So far as we are advised, the motion made by plaintiff in this case presents to this court a new question. It is the contention of the defendant that, having followed the statutes and practice relating to an appeal from an order overruling a demurrer, he has a right to an orderly procedure and time to present his arguments in proper form before this court, and that the granting of plaintiff's motion would deny him this right.

Sec. 3069, Stats., provides that an appeal may be taken from an order which sustains or overrules a demurrer. In taking the appeal defendant was within his legal rights. Has the defendant the right to have his appeal heard in its regular order, irrespective of its merits? The manner and time of hearing appeals to this court is regulated and fixed by the rules of practice in this court. No litigant has a vested right in a particular remedy, so he can have none in rules of procedure which relate to the remedy. *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209; *Newton v. Superior,* 146 Wis. 308, 130 N. W. 242, 131 N. W. 986; *Will of McNaughton,* 138 Wis. 179, 118 N. W. 997, 120 N. W. 288.

It is the constant practice of this court to advance cases for argument, to place causes upon the calendar not here in time to be placed there in accordance with the established rule, and in many other respects to modify its rules and practice in mere procedural matters.

It is argued that the provision of sec. 2951 which authorizes this court in its discretion to adjudge to the defendant in any writ of error and to the respondent on appeal in any civil action damages for his delay, in addition to interest, not exceeding ten per cent. on the amount of the judgment affirmed, and also in its discretion to award him double costs, operates as a limitation upon the power of this court.

We do not regard this as a sound argument. Costs and the right to costs rest upon statutory provisions and the legislature may well prescribe the terms and conditions upon which costs may be awarded. Such a provision, however, in no way limits the power of this court to deal with matters properly here upon appeal.

A mere inspection of the complaint in this case shows without argument that it states facts sufficient to constitute a cause of action. The demurrer in this case is therefore frivolous, and we are obliged to assume that it was taken merely for purposes of delay. Under such circumstances, what is the duty of this court?

We have not the slightest doubt that the court has, in the exercise of its judicial power, ample authority to deal with the matter as it sees fit. It is argued that the court has established a regular procedure; that the legislature, by sec. 2951, has prescribed means by which frivolous appeals may be discouraged, and that the court should not, therefore, establish a different practice. Such a course no doubt could be justified by argument and authority. It would tend at least to lighten the labors of the court; but we are not disposed to approach the question from that angle.

Much has been said and written in recent years in regard to unnecessary delays in litigation. This criticism has to some extent been warranted, but we believe at the present time that it does not justly apply to the courts of the state of Wisconsin, either trial or appellate. Delays in court procedure are not more common than are delays in the execution of private contracts or other private enterprises; in each the human element is an important factor. The courts are not chargeable with the delays due to the procrastination of litigants. The declaration contained in sec. 9, art. I, of the constitution of this state, that every person ought to obtain justice freely, without being obliged to purchase it, completely, without being denied, promptly, without delay, in conformity with the law, is not mere rhetoric.

It lays upon every officer of this state, especially upon administrative and judicial officers, an imperative duty which should be performed without hesitation.

A frivolous appeal for purposes of delay defeats one of the rights guaranteed to every citizen by our constitution, and presents a situation which should be so dealt with as to carry into effect the constitutional mandate. Members of the bar are officers of the court and subject to this mandate of the constitution, and they should not permit zeal for the interest or supposed interest of a client in individual cases to stand in the way of a faithful performance of their paramount duty. Lawyers should heartily co-operate with courts in so dealing with procedural matters as to expedite the trial of causes upon their merits, avoiding unnecessary delays, and furthering the speedy attainment of justice, so that the purpose of our constitution and laws may be achieved.

If we were unsupported by authority we should not hesitate to deal with this matter in accordance with fundamental principles and the constitutional mandate. While the practice proposed upon this motion is new here, there is abundant precedent for it elsewhere. *Steele v. Culver,* 211 U. S. 26, 29 Sup. Ct. 9; *Ruble v. Daniel,* 105 Miss. 569, 62 South. 642; *Johnson v. St. Paul City R. Co.* 68 Minn. 408, 71 N. W. 619; *Himebaugh v. Crouch,* 3 S. Dak. 409, 53 N. W. 862; *Micas v. Williams,* 104 U. S. 556; *Guardianship of Williams,* 97 Neb. 726, 151 N. W. 161; *Estate of Landon,* 98 Neb. 706, 154 N. W. 215. The supreme court of North Carolina said:

"While ordinarily an appeal lies to the supreme court . . . as a matter of right, it is required that it must be *bona fide* for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay it will, upon due notice to appellant, be dismissed upon appellee's motion." *Ludwick v. Uwarra M. Co.* 171 N. C. 60, 87 S. E. 849.

The court of appeals of New York has also adopted this practice, and has indicated the basis upon which it will consider a motion to dismiss an appeal upon the ground that it is frivolous. It said:

"This motion is one of a large class imposing much labor on the court and that ought not to be made. An exception must be so obviously frivolous on its face as to require no argument to demonstrate it. In this case briefs are submitted citing authorities to support the opposing views. The fact that such a course is necessary is conclusive evidence that the motion should be denied. An examination of the record discloses a number of exceptions that can only be disposed of after argument of the appeal. The rule in motions of this character is similar to that applied to a party asking judgment on a frivolous pleading." *Bachrach v. Manhattan R. Co.* 154 N. Y. 178, 47 N. E. 1087.

While in a large number of the cases cited the appeals were dismissed, in view of the provisions of sec. 3071, Stats., which provides that upon an appeal from a judgment or order or upon a writ of error the supreme court may reverse, affirm, or modify the judgment or order, we are of the opinion that, the appeal being properly here, it is the better practice to affirm the order instead of dismissing the appeal.

It appearing that the appeal is frivolous, the provisions of sec. 2951, already referred to, apply.

By the Court.—The order appealed from is affirmed, with double costs. The clerk is directed to remit the record to the circuit court for Outagamie county forthwith.

HARLOFF and another, Respondents, vs. MERWIN, Respondent, and INDUSTRIAL COMMISSION OF WISCONSIN, Appellant.

May 8—June 1, 1920.

Workmen's compensation: Election by employee: Evidence: Making claim against third person causing injuries: Action to review award of industrial commission: Amendment of complaint.

1. Under sec. 2394—19, Stats., an employer, suing to set aside an award of the industrial commission, could at the trial amend his complaint by setting up as an additional ground certain matter relating to a settlement by the injured employee with a third person whose negligence caused his injuries.
2. In view of the circumstances of the case, acceptance by the injured employee during some weeks of medical, surgical, and hospital services from his employer is *held* not to have constituted an election under the workmen's compensation act (sec. 2394—25, Stats.), the question in each case being one of intention.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Merwin was an employee of *Harloff*. *Harloff* lived on a farm a short distance from the city of Milwaukee, and was subject to the provisions of the compensation act. While going from the farm of his employer to Milwaukee, *Merwin* rode his motorcycle, which was fastened to the rear of his employer's wagon. He intended to take the motorcycle to a shop for repair. *Merwin* was run into by one E. M. Brah and sustained severe injuries. He was immediately taken to a hospital, where he remained for about eleven weeks. His employer and the insurance carrier paid the surgical, medical, and hospital bills. While in the hospital *Merwin* was visited by Brah, who admitted his liability for the injuries which *Merwin* had sustained, and Brah proposed a settlement. After some solicitation by Brah and on the 19th day of September, 1916, *Merwin* accepted from Brah

$1,000 in cash and an automobile worth $200. Within a day of the expiration of two years from the date of his injury *Merwin* filed a claim for compensation against his employer under the provisions of the workmen's compensation act. The settlement with Brah was made after *Merwin* was fully advised as to his rights under the compensation law, and further, that if he made the settlement it would constitute an election on his part, and that his employer would not be liable. The *Industrial Commission* held that the acceptance of the medical, surgical, and hospital treatment constituted an election on *Merwin's* part which amounted to the making of a claim; that *Merwin,* therefore, at the time he made the settlement with Brah, was not the owner of the claim, and that the settlement was a nullity; that the employer was liable for compensation; allowed credit for the $1,200 received by *Merwin,* and gave him an award against his employer for $280.45.

The employer began this action in the circuit court for Dane county to review the award made by the *Industrial Commission.* The original complaint alleged that the *Industrial Commission* acted without and in excess of its powers in making each of six different findings; the allegations being made in separate paragraphs as to each finding. The complaint, however, made no reference to the fact that the *Commission* had failed to find that a settlement was made by *Merwin* with Brah. Upon the trial, September 2, 1919, the court permitted the complaint to be amended so as to set up the settlement. The trial court held that the payment of the bill for medical, surgical, and hospital care did not amount to "the making of a lawful claim . . . for compensation" within the meaning of sub. 1, sec. 2394—25, Stats.; that it did appear that the employee had made a claim against the third party for damages and in addition had fully settled such claim; that the making of such claim was a waiver of any claim for compensation against his employer.

Judgment was entered vacating and setting aside the award of the *Industrial Commission,* and from this judgment the *Industrial Commission* appeals.

For the appellant there were briefs by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

James T. Drought of Milwaukee, for the respondents *Harloff* and *Royal Indemnity Company.*

ROSENBERRY, J. The appellant contends that the trial court erred in allowing an amendment to the complaint. Sec. 2394—19, Stats., provides:

". . . Within twenty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. . . . Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

"(1) That the commission acted without or in excess of its powers.

"(2) That the order or award was procured by fraud.

"(3) That the findings of fact by the commission do not support the order or award."

The complaint alleged "that the defendant, the *Industrial Commission of Wisconsin,* acted without and in excess of its powers in making the following finding:" —after which the first finding was set out. With a like introduction each of the six findings made was set out. The contention of the appellant is that each of the separate paragraphs constitutes a cause of action, and that the introduction by way of amendment of the matter relating to the settlement was the introduction of a new cause of action, and therefore not permissible because by the terms of the statute such action

was not brought within twenty days of the date of the order or award, as provided in the statute.

We regard this as entirely too technical and restrictive a construction upon the provisions of the statute in question. There is only one cause of action—that to review the award of the *Commission*. It may proceed upon any of three grounds, and not upon other grounds. The matter brought in by way of amendment alleged additional facts upon which the plaintiff sought to maintain its allegation that the *Commission* had acted without or in excess of its powers. There was but one cause of action and not six. In making the award the *Commission* could act but once without or in excess of its powers. Inasmuch as the amendment introduced no new cause of action, but set out additional facts upon which the plaintiff's cause of action might be maintained, reference to cases holding that where a cause of action is barred by the statute of limitations it cannot be introduced by way of amendment to an action begun before the statute applied, have no bearing upon this question. Had the plaintiff sought to introduce by amendment facts which tended to show that the award should be set aside because procured by fraud, or that the findings did not support the award, a different question would be presented, as to which we make no intimation.

The second contention of appellant is that the court erred in holding that *Merwin* elected to pursue his common-law remedy against Brah, and the plaintiffs were thereby released from liability for compensation.

Sec. 2394—25, Stats. 1915, provides:

"1. The making of a lawful claim against an employer for compensation under sections 2394—3 to 2394—31, inclusive, for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party.

"2. The making of a claim by an employee against a third party for damages by reason of an accident covered by sections 2394—3 to 2394—31, inclusive, shall operate as a waiver of any claim for compensation against the employer."

This assignment of error involves the contention that, by accepting the medical, surgical, and hospital services furnished by the plaintiffs, *Merwin* had made an election under the provisions of sub. 1, sec. 2394—25.

In the month of August, 1916, the attorney for *Merwin* wrote several letters to *Harloff* in relation to *Merwin's* claim. On August 17th he wrote:

"What agreement or terms have you come to with Mr. Brah in relation to the personal injury suit of *Harry Merwin?* . . . *Mr. Merwin* is desirous of having the same adjusted with as little delay as possible, and if no action against Mr. Brah will be successful, that we can have the same adjusted by your company."

On August 30th he wrote:

"Unless some substantial offer of settlement is made, we will have to proceed to a hearing before the *Industrial Commission* to adjust the same."

On September 15th he wrote:

"I have been waiting for a reply concerning the *Merwin* matter, regarding which some time ago you stated that undoubtedly the same would be settled within a short time. I wish you would give me full and exact information regarding Mr. Brah's attitude towards this case and what he intends to do regarding settling the same, so that I may be in position to proceed accordingly."

On September 19th *Merwin* settled with Brah, executing a full and complete release.

Admitting that the medical, surgical, and hospital services rendered constitute compensation in ordinary cases, we are of the opinion that the *Industrial Commission* was in error in holding that acceptance of such aid under the

circumstances of this case constitutes an election under the provisions of sec. 2394—25. We shall not attempt to lay down a rule which shall apply to all cases. Whether or not the injured employee has made an election under this provision of the statute is a question of intention in each case, and each case must therefore rest upon its peculiar facts. It may be said, however, that in any case the injured employee must do something which amounts to an election on his part to claim satisfaction either from his employer or the negligent third party for the injury which he has sustained. Until he has done something which evidences his intention to pursue either the one course or the other the choice remains open to him. The passive acceptance of medical, surgical, and hospital aid did not in this case amount to such an election. When taken to the hospital he was unconscious and in no position to make an election. How can an election be inferred under such circumstances? At what point in his convalescence can it be said that acceptance of such aid constituted an election to claim satisfaction of his employer? The statute should be so construed as to give the employee a choice free from any restraint. The acceptance of temporary benefits, although in this case extending over a period of eleven weeks and amounting to a considerable sum, did not constitute such an election. The evidence, including the letters of his attorney, shows plainly that he wavered in his choice, and that when he did choose he chose to proceed against Brah. Procedure against the third party is made by the terms of the statute to operate as a waiver of any claim for compensation against the employer.

The trial court therefore correctly held that the award of the *Industrial Commission* should be vacated and set aside.

By the Court.—Judgment affirmed.

IN RE HENKE. [Habeas corpus.]

May 8—June 1, 1920.

Extradition: Courts: What law governs: Fugitive from justice: Motive in leaving state.

1. Extradition being a proceeding founded upon the federal constitution and laws, the decisions of the United States supreme court govern the construction that must be given to the provisions relating thereto.
2. A person who, after committing a crime, leaves the state, in whatever way or for whatever reason, and is found in another state, is a fugitive from justice, the motive inducing his departure from or his intent to return to the demanding state being immaterial, as is also the fact that he could have been arrested in the demanding state or that he left with the knowledge or consent of the prosecuting witness.

ERROR to review an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The governor of Illinois made a requisition upon the governor of this state for the extradition of the accused on the ground that he was a fugitive from justice from the state of Illinois, where, it is alleged, he had committed a crime for which extradition lies. The governor of this state issued a warrant for his extradition, and the accused sued out a writ of *habeas corpus* directed to C. A. Bothfuhr, the agent of the state of Illinois who then had him in charge. Upon a hearing in the circuit court an order remanding him to the custody of Mr. Bothfuhr was made. To test the validity of such order the accused sued out a writ of error.

For the plaintiff in error there was a brief by *Wheeler & Witte* of Milwaukee, and oral argument by *Lyman G. Wheeler.*

For the defendant in error there was a brief by *Winfred C. Zabel,* district attorney of Milwaukee county, *Arthur H. Bartelt,* assistant district attorney, and *Wayne Dyer* of Kan-

kakee, Illinois; and the cause was argued orally by *Mr. Bartelt.*

VINJE, J. Upon the hearing in the circuit court defendant claimed he was not a fugitive from justice because he came into this state for a lawful, temporary purpose and with the intent to return to the state of Illinois in a short time. Hence he was not subject to extradition. The question is, Can such a defense be maintained? Extradition is a proceeding founded upon our federal constitution and laws, and therefore the decisions of the supreme court of the United States govern the construction that must be given to the provisions relating thereto.

In *People ex rel. McNichols v. Pease,* 207 U. S. 100, 28 Sup. Ct. 58, Justice HARLAN reviews the authorities on the subject and states certain principles deducible from them. The first one is this:

"A person charged with crime against the laws of a state, and who flees from justice, that is, after committing the crime leaves the state, in whatever way or for whatever reason, and is found in another state, may, under the authority of the constitution and laws of the United States, be brought back to the state in which he stands charged with the crime, to be there dealt with according to law."

It will be seen from the above statement that it is wholly immaterial in what way or for what reason the accused left the state where the crime is alleged to have been committed. The fact that he is found in an asylum state makes him a fugitive from justice irrespective of the motive that brought him there or induced the departure from the state where the crime was committed. *Roberts v. Reilly,* 116 U. S. 80, 6 Sup. Ct. 291; *Appleyard v. Massachusetts,* 203 U. S. 222, 27 Sup. Ct. 122; *Drew v. Thaw,* 235 U. S. 432, 35 Sup. Ct. 137; *State ex rel. Curry v. Wagener* (Minn.) 177 N. W. 346; 11 Ruling Case Law, 732. This is on the ground that

it would render extradition a burdensome and inefficient process if the motives of the accused for entering the asylum state could be made an issue. The state would in many instances be powerless to rebut the case made by the accused on such issue, and it would afford an easy avenue of escape if he could not be extradited because he could show that he came into the asylum state for purposes other than that of fleeing from justice. Likewise the fact that he could have been arrested in the demanding state, or that he left with the knowledge or consent of the prosecuting witness, is immaterial. *State ex rel. Curry v. Wagener, supra.*

By the Court.—Order affirmed.

COCHRANE, Appellant, vs. JACOB E. DECKER & SONS, Respondent.

May 10—June 1, 1920.

Sales: Construction of contract by parties: Agreement to order goods at seller's prices: Validity: Construction: Pleading: Action for commission: Counterclaim for conversion.

1. A counterclaim for conversion by plaintiff of goods consigned to him by defendant arises out of the same transaction set forth in a complaint for commission, and was properly pleadable by way of counterclaim under sec. 2656, Stats., as it has been liberally construed.
2. A written contract for the handling by plaintiff of defendant's products which permitted plaintiff to order from defendant any quantity of goods he desired, and for which plaintiff was to pay the prices fixed by defendant, retaining anything secured above such prices, clearly and unambiguously provides for the payment of the prices at which defendant billed the goods to plaintiff, so that parol evidence by plaintiff as to the meaning of prices was properly excluded.
3. Where the parties dealt with each other for several months under a contract requiring plaintiff to account for goods consigned to him at defendant's prices, and there was considerable correspondence in which plaintiff expressed dissatisfac-

tion with defendant's prices but did not claim that the price was to be determined in any other way, the course of dealing indicated that the plaintiff was to pay for the goods at the prices at which they were billed by defendant.

4. An agreement to take and handle such goods as plaintiff might order from defendant and pay therefor at prices fixed by defendant which did not require plaintiff to order any goods from the defendant, was not contrary to public policy.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Prior to November, 1916, the plaintiff had for many years been an employee of the Plankinton Packing Company of Milwaukee. About that time he engaged in the merchandising of meats and packing-house products upon his own account, doing business under the name of L. A. Cochrane Company. The defendant operated a packing house at Mason City, Iowa. The plaintiff and defendant commenced doing business about November 15, 1916. Finally their arrangement was reduced to writing under date of November 24, 1916. The defendant agreed to consign the plaintiff such packing-house products as in the opinion of the plaintiff could find ready sale in Milwaukee. Plaintiff agreed to sell the products for defendant's account at prices fixed by it, billing all goods sold to purchasers on triplicate blanks, one of which was to be immediately forwarded to the defendant. There were other provisions with respect to details of continuing the business. Plaintiff agreed to sell on commission within thirty days from date of shipment, and to be responsible for any loss on account of deterioration in quality or shrinkage in cases where goods were not sold within that period. Plaintiff agreed to handle all merchandise belonging to the defendant without expense to the defendant "beyond the following agreed commissions and charges: 50c. per cwt. on all fresh pork, offal, sausage material, including beef, trimmings, boneless butts, etc.; one

per cent. commission on straight or mixed cars of packing-house products."

The agreement was subject to termination by either party by giving five days' notice, and contained provisions for winding up the business in the event the contract should be terminated.

Cochrane becoming dissatisfied with the commission arrangement, the contract was modified under date of February 1, 1917. By the modification the clauses of the contract with reference to commissions were abrogated and in lieu thereof the following provisions were to govern:

"All packing-house products and other products to be handled and sold by *Cochrane* are sold for the account of *Jacob E. Decker & Sons,* etc.

"*Decker* is to bill all product to *Cochrane* at their prices f. o. b. Mason City, and *Cochrane* is to receive the difference between said prices and the prices which he sells the product for, and should he sell the product for less than the billing prices, the difference is to be deducted from the above mentioned commissions.

"It is distinctly understood that all charges for transportation on shipments from Mason City will be borne and paid for by *Cochrane,* and that under no circumstances are any expenses of any kind incurred in the handling of this business to be charged to or paid for by *Decker,* it being distinctly understood that *Decker* is to receive at all times the total value of the shipment as priced by them, as heretofore mentioned. It is also understood that any shrinkage or anything of any kind or description not mentioned herein will have to be borne and paid for by *Cochrane.*"

Cochrane continued in business until July 20, 1917, in the meantime having converted to his own use a large amount of defendant's products. At or about that time the defendant took possession of all product remaining on hand, and was assisted in disposing thereof by *Cochrane,* who worked under a new agreement. September 11, 1917, the plaintiff began this action to recover a balance due for breach of contract in the sum of $8,124.64.

In his complaint the plaintiff alleged that he had billed four separate items of goods to himself, and claimed commission on account thereof. The defendant answered by way of general denial, and set up by way of counterclaim that the plaintiff had converted goods belonging to defendant to the value of $7,794.12. Upon the trial the plaintiff amended the complaint, set up certain oral agreements, and claimed damages in the sum of $9,376.18.

The case was submitted to the jury upon special verdict. The jury found (1) that the defendant was not indebted to the plaintiff in any sum in excess of $1,258.22 as admitted by the defendant; (2) that the total gross commission to which the plaintiff was entitled was $12,591.36; (3) that there was owing on account of commissions, not considering any of the amounts involved in the counterclaim, $760.90; (4) that the plaintiff was guilty of converting the property of the defendant to his own use; (5) that the defendant had not waived its right to claim conversion; (6) that the damages suffered by the defendant by reason of the conversion were $7,850.44.

There was a motion to set aside the verdict and for a new trial, which was denied, and the defendant had judgment for the sum of $6,084.72, certain items in dispute having been admitted by the defendant to be due the plaintiff in order to avoid possible errors upon the trial. From the judgment the plaintiff appeals.

F. X. Boden of Milwaukee, for the appellant.

Lawrence A. Olwell of Milwaukee, for the respondent.

ROSENBERRY, J. The plaintiff contends that the matters set up in the defendant's counterclaim were not pleadable as such under the provision of sec. 2656, Stats., relating to counterclaims, because the cause of action set out in the counterclaim sounded in tort and was not pleadable in a contract action.

The cause of action set out in the counterclaim arose out of the transaction set forth in the complaint, and under the liberal construction given to the provision of sec. 2656 in the case of *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445, was properly pleadable by way of counterclaim.

The principal contention of the appellant is that the court erred in striking out certain testimony and excluding other evidence offered as to the meaning of the words "their prices," used in the agreement of the parties made February 1st. The plaintiff contends that under *Ganson v. Madigan,* 15 Wis. 144; *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661; *Vilas v. Bundy,* 106 Wis. 168, 81 N. W. 812, and other Wisconsin cases, he was entitled to show the meaning of the words "their prices," and that the words were used with a limited or particular meaning.

There are two answers to this contention. We are not left to the words "their prices," standing by themselves, to ascertain the intent of the parties to this contract. By the agreement of February 1st the defendant is to bill all product at "their prices" f. o. b. Mason City. The plaintiff is to receive the difference between such prices and the prices for which he sells the product, and if he sells for less than the billing price the difference is to be deducted from amounts due the plaintiff, and the plaintiff agrees that the defendant is to receive at all times the total value of the shipment as priced. It is to be remembered that the contract did not require the plaintiff to accept and pay for any specified amount of packing-house product. He might order from the defendant when and as he saw fit. There is therefore nothing inconsistent in permitting *Decker* to place such prices upon the goods shipped by the defendant as the market warranted. To say that this referred to cost price would be unreasonable as to the defendant, for the plaintiff might wait and if prices went up order large amounts of goods, and if prices declined fail to order any goods; an ar-

rangement to which no prudent business man, situated as was the defendant, would consent.

In addition to that, the course of dealing between the parties shows that the contract was construed to mean that the plaintiff should take the goods at the price fixed by the bills or invoices rendered to the plaintiff. Not until the suit was begun, although there was considerable correspondence and negotiation between the parties, and the plaintiff expressed dissatisfaction with the defendant's prices, was the claim set up that the price was to be determined in any other way than is clearly indicated by the language of the contract; that is, that the plaintiff was to pay the price at which the goods were billed to him. We are of the opinion that the evidence was properly stricken out and excluded.

The argument is made that, because the contract permitted the defendant to fix the prices at which its goods should be sold, the contract is void as against public policy. We are of the opinion that no question of public policy is involved. The plaintiff was not required to order any goods from the defendant. He knew the prices at which the goods were being billed to him; he knew the market prices; and had he not supposed that he could handle the goods at a profit he would not have continued the arrangement (as he did) for several months.

Several other errors are assigned which we shall not treat in detail. We have examined the voluminous record of seven or eight hundred pages, and have carefully considered the points raised by appellant's attorneys, and are of the opinion that the record shows no substantial error.

By the Court.—Judgment affirmed.

JOHN, Respondent, vs. PIERCE, Appellant, and another, Respondent.

May 6—June 23, 1920.

Automobiles: Law of the road: Violation of statute: Negligence: Contributory negligence of driver of automobile imputed to occupant: Evidence: Res gestæ: Admissions: Instructions as to relative weight: Testimony not objected to: Effect.

1. The violation of secs. 1636—49 and 1636—49*b*, Stats., by turning an automobile to the left instead of to the right on approaching another automobile, is in itself negligence.
2. Statements made by the driver of an automobile, immediately after a collision with another car and at the place of collision, are a part of the *res gestæ*, being on the same footing as any other facts relating to the immediate transaction.
3. Where statements were received as part of the *res gestæ*, as were also statements in the nature of admissions, it was error in instructing the jury not to point out the distinction between the two classes of evidence, as the jury might infer they were to use more caution in believing the testimony as to conversations which were part of the *res gestæ* than the testimony as to other facts immediately surrounding the transaction.
4. Testimony not objected to at the trial may be considered by the jury.
5. Where it is shown that the driver of the automobile in which plaintiff was riding turned to the left instead of to the right upon meeting defendant's automobile, a charge in general terms that the latter had a right to assume that every person whom he meets will exercise ordinary care to avoid injury is insufficient; and a requested instruction that he had a right to expect that a turn to the right would be made, until such time as an ordinarily prudent person would know otherwise, should have been given.
6. The driver of an automobile on a highway has the right to assume that an automobile coming in the opposite direction will keep to the right.
7. Contributory negligence on the part of the driver of the automobile in which plaintiff was riding would defeat his right to recover for damages received in a collision with another automobile, also negligently driven.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Re-*

versed as to defendant Pierce; affirmed as to defendant Johnson.

The plaintiff was a passenger in the front seat of an automobile driven by defendant *William B. Johnson* on a highway in Waukesha county August 18, 1918. They were proceeding westerly at about the center of the highway at from fifteen to eighteen miles per hour. On approaching a bend in the highway the driver, *Johnson,* saw coming around from the west, at a speed at such time of between twenty-five and thirty miles per hour, an automobile belonging to the defendant *Frederick L. Pierce* and being driven by *Mr. Pierce's* daughter. The traveled portion of the highway at this point was about twenty feet in width. In front and on *Johnson's* left-hand side was a level open space on the side of the road made by an old gravel pit. To *Johnson's* right and outside the traveled way were some trees and some clear space. Under *Johnson's* own testimony, the moment he saw the automobile approaching at a high speed he, *Johnson,* immediately turned his automobile quite sharply to the left and did not again look to see where the *Pierce* car was until just the moment of the collision between the two. This collision occurred just a little outside of the traveled portion of the highway in the gravel pit. The cars met practically head on, and several of the respective occupants were injured.

Plaintiff commenced this action alleging various grounds of negligence on the part of the defendant *Pierce* and made *Johnson* also a party defendant, but alleging no ground of negligence as against him, stating that he was made defendant that he, *Johnson,* might be bound by whatever judgment was rendered in the action, on the ground that the defendant *Pierce* claimed that the collision was proximately caused by the carelessness and negligence of the defendant *Johnson.* Plaintiff prayed for judgment against the defendant *Pierce,* and in the event only that the defendant

Pierce succeeds in such claims and they are found to be true that then only and in that alternative he, plaintiff, may have judgment against *Johnson.*

To this complaint defendant *Johnson* demurred. The defendant *Pierce* then moved the court for permission to be allowed to file a cross-complaint against the defendant *Johnson,* alleging that the injuries to plaintiff were caused by the negligence of *Johnson,* and that by reason thereof there was a right on the part of defendant *Pierce* to be indemnified by said *Johnson* for any loss or damage which he, *Pierce,* might sustain by reason of plaintiff's claim.

The demurrer of defendant *Johnson* to the complaint was sustained. An order made *Johnson* a party, and the amended summons and complaint were served upon him.

The defendant *Johnson* then demurred to the complaint again and demurred separately to the cross-complaint. Upon hearing, the demurrer to the amended complaint was again sustained and that to the cross-complaint overruled. The defendant *Johnson* then answered the cross-complaint, and the cause proceeded to trial upon such pleadings.

Near the close of the trial the plaintiff, with the understanding that defendant *Pierce* would make no objection to such action, asked to amend the complaint by alleging on information and belief that the defendant *Johnson* carelessly and negligently operated the automobile in which plaintiff was riding, by failing to keep a proper lookout; to be on the proper side of the road; and by failing to keep his car under proper control; and that if the jury should find negligence in such particulars as a proximate cause of plaintiff's injuries, judgment might go in plaintiff's favor against said defendant. And he then submitted the witnesses that had been called on his part for further cross-examination by defendant *Johnson's* attorneys. The ruling on such motion was withheld until the close of the testimony. Defendant *Johnson* then moved for a directed verdict in his favor for a dismissal. The court denied the

motion to amend the complaint, but at first ruled that he would not grant the motion of defendant *Johnson* until after the jury returned the special verdict, lest the jury might draw some improper inference or conclusion from the granting of such motion. However, while the jury were considering the special verdict the court called them in and then directed them to find a verdict in favor of defendant *Johnson,* but at the same time cautioning them that they were to draw no inference whatsoever from such action on his part in their consideration of the special verdict.

By special verdict the jury found as follows:

First, that there was a failure to exercise ordinary care in the operation of defendant *Pierce's* automobile by his daughter as it approached and collided with the *Johnson* automobile.

Second, such want of ordinary care was a proximate cause of plaintiff's injury.

Third, that there was no want of ordinary care on the part of defendant *Johnson* proximately contributing to plaintiff's injuries.

Fourth, plaintiff's damages were assessed at the sum of $5,200.

After respective motions by the parties the court granted judgment in favor of the plaintiff for the amount of the verdict, and from the judgment entered in accordance therewith defendant *Pierce* has appealed.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

For the respondent *John* there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Nathan Glicksman.*

For the respondent *Johnson* there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Charles B. Quarles* and *Edgar L. Wood,* all of Milwaukee.

ESCHWEILER, J. It is undisputed in this case that *Mr. Johnson,* the driver of the car in which plaintiff was riding at the time of the collision, turned to his left as he saw the *Pierce* car approaching. In so doing he violated the law of the road as embodied in the statutes, secs. 1636—49 and 1636—49*b,* in failing to turn to the right in approaching and passing. Such a violation of the penal statutory provisions regulating the use of highways was of itself negligence. *Steinkrause v. Eckstein,* 170 Wis. 487, 175 N. W. 988; *Yahnke v. Lange,* 168 Wis. 512, 516, 170 N. W. 722, and cases cited therein.

Under the evidence in this case showing that the collision occurred immediately upon such negligence by *Johnson,* we are convinced that the finding of the jury that there was no want of ordinary care on *Johnson's* part that proximately contributed to produce plaintiff's injury was very probably arrived at by them on account of errors occurring on the trial and which we must deem prejudicial and requiring a reversal of the judgment.

Immediately after the collision and as some of the injured occupants of the respective automobiles were being taken away from the immediate point of collision, certain conversations were had with *Mr. Johnson;* which, under the testimony as presented by defendant *Pierce* concerning them, would warrant an inference by the jury that the collision occurred by reason of *Johnson's* negligence rather than that of any other person. Conversations of a similar nature were had a few minutes afterwards when some of the injured persons, including the daughter of defendant *Johnson,* had been removed to a house in the neighborhood, and still another within an hour or two after the accident at the residence of a friend to which *Mr. Johnson,* the plaintiff, and others of the party had gone.

In charging the jury the court said as follows:

"There has been some evidence as to what *Mr. Johnson* said shortly after the collision. The weight to be given to

testimony of admissions is to be determined by the jury. Such testimony should be received with great caution. Statements or admissions of a party satisfactorily proven and understandingly and deliberately made, which bear upon or give character to the acts of a party or throw light upon a pending controversy, may have very great force as evidence and are proper to be considered by the jury. But evidence of casual statements or admissions of a party, made in casual conversation to disinterested persons, should be considered by the jury in determining the weight to be given to them in view of the liability of witnesses to misunderstand or forget just what was said, depending upon all the surrounding circumstances."

Exception was taken to this portion of the charge, and we think properly. The statements made by *Mr. Johnson* immediately after and at the place of the collision were properly received as parts of the *res gestæ*. *Dixon v. Russell,* 156 Wis. 161, 145 N. W. 761; *Cohodes v. Menominee & M. L. & T. Co.* 149 Wis. 308, 135 N. W. 879; *First Nat. Bank v. Industrial Comm.* 161 Wis. 526, 154 N. W. 847; *Andrzejewski v. Northwestern F. Co.* 158 Wis. 170, 177, 148 N. W. 37.

Such statements are of material weight and substance, and, being treated as a part of the transaction, they are on the same footing as any other facts relating to the immediate transaction. Being parts of the *res gestæ,* they are in a separate and distinct class from the same statements which, when subsequently made, become mere recitals of a past transaction. An instruction applicable to the one class is either too weak or too strong for the other. The instruction here given covered both classes, but did not point out to the jury the substantial difference between them such as was particularly displayed in this case.

From this instruction the jury would naturally but erroneously infer that they were to use more caution in considering and thereby more reluctance in believing the testimony of the witnesses for defendant *Pierce* in relation to the con-

versations which were parts of the *res gestæ* than they were as to the testimony of the same or other witnesses as to other facts immediately surrounding the transaction.

Respondent suggests on this appeal that the statements by *Mr. Johnson* after the interested parties had removed from the scene of the accident could not be received as binding upon the plaintiff, for the reason that *Mr. Johnson* could not be considered as more than the agent of the plaintiff so far as the driving of the automobile was concerned, and that therefore his subsequent admissions could not bind the plaintiff under the rule as stated in *Bell v. Milwaukee E. R. & L. Co.* 169 Wis. 408, 414, 172 N. W. 791. Such an objection was not, however, interposed on the trial, and the testimony remained before the jury for their consideration, and properly so, in view of the fact that *Johnson* was at the time still a party to the lawsuit.

Defendant *Pierce* requested the following instruction:

"If you find it to be a fact that as the two automobiles approached one another both machines were on the south side of the road, the driver of the defendant *Pierce's* automobile had a right to expect and assume that the defendant *Johnson* would observe her approach and would seasonably turn to the right and cross the road to the north side thereof, and her right to so assume continued until such time as it became apparent to her, or would have become apparent to an ordinarily prudent person similarly situated, that defendant *Johnson* did not intend to turn to the right."

The court did not give the instruction requested, but did charge the jury as follows:

"Every operator of an automobile has the right to assume and act upon the assumption that every person whom he meets on the street or highway will exercise ordinary care and caution according to the existing circumstances to avoid injury; that he will not expose himself to danger negligently or recklessly, but will, as is his duty, exercise ordinary care to avoid collision, and if he sees a vehicle before it strikes him or by reasonable use of his senses could see it in time

to avoid the injury, that he will promptly, in the exercise of ordinary care, attempt to avoid the injury."

We think the instruction given did not sufficiently meet the law as applicable to the particular situation involved and the proposed instruction should have been given. *Zimmermann v. Mednikoff,* 165 Wis. 333, 336, 162 N. W. 349; *Klokow v. Harbaugh,* 166 Wis. 262, 265, 164 N. W. 999.

It is very manifest that had *Johnson* obeyed the law of the road and kept to the right there would have been no accident. The driver of defendant *Pierce's* car had the right to assume that *Johnson* would so keep to the right until the contrary intention appeared. The purpose of these highway regulations is in a measure twofold: first, that they shall be obeyed when they come into effect, as here, when two such vehicles approach and pass; and secondly, that each traveler may act in so obeying on his own part with the assumption that the other will also so obey, and may continue in such assumption until he is or ought to be apprised to the contrary. The instruction as given by the court was perfectly proper so far as it went with reference to the general duty of exercising ordinary care, but it did not present the important feature embodied in the statutory duty imposed upon *Johnson.* Travelers on the highway may well, in the exercise of ordinary care, under many circumstances pass to the left, but public policy has declared that a rule is to be maintained of passing to the right. The failure to do so is of itself negligence as a matter of law, and the instruction as given failed to disclose to the jury that it was not left for them to determine whether the turn to the left was or was not ordinary care.

It is unquestioned by any of the parties that under the law of this state as so recently stated in *Puhr v. C. & N. W. R. Co.* 171 Wis. 154, 176 N. W. 767, contributory negligence on the part of *Mr. Johnson* as driver of the car in which plaintiff was riding would defeat his right to recover against the defendant *Pierce.*

In the opening statement to the jury, in commenting upon the position of the two cars prior to the collision and the respective claims of their drivers, plaintiff's counsel said as follows:

"We are not very much concerned except that we do not sue our host; we sued the driver of the other car, but the real contest in this case will be between *Mr. Johnson* and *Mr. Pierce* to determine who was to blame for this collision."

The denial, at the close of the testimony, of plaintiff's motion then made for permission to amend his complaint so as to enable him to recover against the defendant *Johnson* for his negligence, and after the case had been submitted to the jury the granting of the motion, in the presence of the jury, of defendant *Johnson* for a dismissal of the cause as to him, although accompanied as it was by a caution from the court to give it no weight in their deliberations, might very well have influenced them in determining the question which had been so presented to them by plaintiff in the opening statement concerning the negligence of defendants *Johnson* and *Pierce*. The court having deemed it proper to dismiss the action as against *Johnson*, it would quite reasonably appear to the jury to involve his determination that *Johnson* was not negligent; yet this was the precise question involved in the third question of the special verdict and answered by the jury in plaintiff's favor.

As this situation will not appear on a subsequent retrial of the case, it is not necessary to determine whether such proceedings and the errors assigned thereupon on this appeal would alone be sufficient to reverse this judgment.

Defendant *Pierce* appealed from that portion of the judgment in the court below as was in favor of the defendant *Johnson* as against the defendant *Pierce* dismissing the action as to the defendant *Johnson* upon the cross-complaint.

No grounds are urged by defendant *Pierce* in support of that part of the appeal, and we cannot, from a considera-

tion of the record, see any grounds for disturbing that part of the judgment.

By the Court.—The judgment against the defendant *Pierce* in favor of plaintiff is reversed, and a new trial granted as between them. The judgment dismissing the cross-complaint of defendant *Pierce* against the defendant *Johnson* is affirmed.

SIEBECKER, J., dissents.

SHORTLE, Respondent, vs. SHEILL, Appellant.

June 1—June 23, 1920.

Automobiles: Collision with truck: Law of the road: Contributory negligence: Leaving usual course of travel: Appeal: Bill of exceptions: Supplemental certificate of trial judge: Effect.

1. Where a bill of exceptions was transmitted to the supreme court with a certificate that it contained all of the evidence given on the trial, and the trial judge filed with the clerk of the circuit court a paper in the form of a certificate, stating that the bill of exceptions did not contain certain exhibits and the ruling of the court on one of the issues in the case, and the latter certificate, with attached exhibits, was transmitted to the supreme court as a supplemental return, the second certificate and the exhibits attached did not become any part of the record in the case.
2. Where it plainly appears from the record that the trial court determined that defendant was negligent as a matter of law, failure to include in the special verdict a question as to his negligence was not prejudicial.
3. Whether deceased was guilty of contributory negligence in driving a truck, during a period of heavy traffic, to the left of a monument in the center of intersecting streets, whereas vehicles going in the same direction as deceased ordinarily went to the right of the monument, is for the jury; and a finding that he was guilty of negligence contributing to his injury is sustained.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Action to recover damages for the death of plaintiff's husband caused by defendant's negligence. Grand avenue is one of the principal streets in the city of Milwaukee and runs east and west. Between Eighth and Eleventh streets on said Grand avenue is the so-called Court of Honor, consisting of a wide strip of raised ground through the center of the street, which is maintained as a lawn and covered with floral decorations. The east-bound traffic, including east-bound street cars, goes south of this strip; the west-bound traffic, including west-bound street cars, goes north thereof. This Court of Honor is not continuous from Eighth to Eleventh streets, but is intersected by the cross streets. In the center of the area designated by the intersection of Tenth street and Grand avenue is a massive stone structure, a monument to the Civil War veterans. The south-bound traffic on Tenth street goes west of this monument, the north-bound traffic east of it.

About 6 o'clock p. m. of the 16th day of November, 1916, the defendant *Robert Sheill* was driving his automobile west on Grand avenue on that portion thereof lying north of the Court of Honor and north of the monument referred to. Plaintiff's husband was driving a one-horse truck north on Tenth street, sitting on a high seat at the front end of the truck. Defendant's automobile collided with the rear wheel of the truck, throwing plaintiff's husband from his position on the truck and causing the injuries from which death shortly resulted.

The following special verdict was returned by the jury: (1) That the deceased, Edward Shortle, in crossing Grand avenue at Tenth street, passed west of the monument; (2) that the deceased, Edward Shortle, was guilty of a want of ordinary care which proximately contributed to produce his injury; and (3) damages, $7,000.

Upon motion made after verdict the court changed the answer of the jury to the second question from "Yes" to

"No" and ordered judgment in favor of plaintiff and against the defendant for the sum of $7,000, with costs. From the judgment so entered the defendant appealed.

Raymond J. Cannon of Milwaukee, for the appellant.

For the respondent there was a brief by *Fish, Marshutz & Hoffman,* attorneys, and *I. A. Fish,* of counsel, all of Milwaukee, and oral argument by *I. A. Fish.*

OWEN, J. A question is raised as to whether we have before us a bill of exceptions certified to contain all of the evidence. Such a certificate was absent from the bill of exceptions first transmitted to this court. After the receipt of the record here, the bill of exceptions was transmitted to the circuit court for correction. Under date of May 15, 1920, a new certificate was attached thereto, by which it was certified that the bill of exceptions contains all of the evidence given on the trial of said action. The record was again returned to this court and filed on the 21st day of May, 1920. On May 27, 1920, the trial judge filed with the clerk of the circuit court a paper in the form of a certificate, wherein it is stated that the bill of exceptions signed by him on May 15th did not contain two certain exhibits offered upon the trial of said action, and did not contain the decision of the court that the negligence of the defendant which proximately contributed to the injury appeared by the undisputed evidence. The missing exhibits mentioned are attached to the certificate. This certificate, with attached exhibits, was transmitted to this court as a supplemental return and filed on the 29th day of May, 1920. These latter documents did not become any part of the record in the case and cannot be considered. *Demier v. Durand,* 15 Wis. 580. But even if they could be received as impeaching the integrity of the former bill of exceptions, the certificate itself points out the defects in the bill of exceptions, which appear to be of very little significance. The exhibits mentioned

consist of a plat and photograph of the vicinity of the accident, which was fully described by witnesses who testified. Furthermore, the ruling of the court upon the question of defendant's negligence appears plainly from the bill of exceptions as certified. We think, therefore, we have before us a properly certified bill of exceptions.

It will be noted that the special verdict, as set forth in the statement of facts, contains no finding upon the question of defendant's negligence. It is strenuously urged by appellant that because of this omission the special verdict does not constitute a sufficient basis for the judgment. It appears from the record, however, that this question was not submitted to the jury because the court held as a matter of law that the defendant was guilty of negligence which proximately contributed to the accident. It would have been much better practice if the question had been included in the special verdict and answered by the court if the court considered that the question was not one for the jury under the facts and circumstances of the case. A cleaner and better record would result from this practice and would leave no room for the thought that the question of the defendant's negligence had not been the subject of judicial determination. In view of the fact, however, that it plainly appears from the record that the question was determined by the court as a matter of law, for which reason it was not submitted to the jury, it does not constitute basis for prejudicial error.

Passing the question of whether the court was warranted in thus disposing of the issue of defendant's negligence, we think there was no justification for changing the answer to question 2 of the special verdict from "Yes" to "No." We think that the jury's answer to the question, by which it found that plaintiff's deceased husband was guilty of negligence which proximately contributed to the accident, is supported by the evidence, and this independent of the question

of whether he violated any statute law or ordinance in driving west of the monument as he proceeded north on Tenth street.

It appears that traffic going north customarily went east of the monument, and that one driving west on Grand avenue would not ordinarily anticipate that a vehicle would be going north on Tenth street to the west of the monument. The evidence further shows that the traffic on Grand avenue and Tenth street was usually heavy during the time of day at which the accident occurred. According to the testimony of witnesses the deceased drove west of the monument across this busy thoroughfare at a brisk pace, looking neither to the right nor to the left, but straight ahead. This circumstance justifies the inference that he had renounced responsibility for his own safety and placed the burden thereof upon those who were using the street concurrently with him. It may be conceded that even had he looked and seen the defendant coming towards him he could not have avoided the collision. He would, however, have been apprised thereof and saved himself from falling from his elevated position. Whether his conduct amounted to such care and prudence as the great mass of mankind usually exercise in the same or similar circumstances is a question upon which reasonable minds might arrive at different conclusions, and was eminently a question for the jury. There is no yard-stick by which it may be determined whether any given action amounts to ordinary care. The decision must of necessity be a matter of human judgment. This is signally true in automobile accident cases. Whether the conduct of one charged with responsibility for an automobile accident amounts to negligence is in the vast majority of cases a question calling for the exercise of human judgment and one upon which men are very likely to differ. In these days, when automobiles are in well-nigh universal use, who is better qualified to pass final judgment upon such matter

than a jury, who can apply to the facts of the case a collective and varied experience? The daring, the reckless, the moderate, the careful, and the timid driver as well as the pedestrian, and he who still clings to Old Dobbin, all find their way to the jury box, and the decision of the jury upon these questions reflects a judgment founded upon varied views, sympathies, and experiences which a court can disregard only when palpably unsupported by evidence or inconsistent with law. A court should be reluctant to brush aside the verdict of a jury rendered upon such a question for no other reason than that such views do not coincide with the views entertained by the presiding judge. In the instant case the jury considered the attitude and conduct of the deceased as it appeared in evidence, and, uninfluenced by any improper considerations so far as we are able to determine, reached the conclusion that he failed to exercise that degree of care for his own safety which would have been exercised by men of ordinary care and prudence under the same or similar circumstances and that such failure proximately contributed to the accident. That the verdict is erroneous is by no means subject to demonstration. To set it aside merely illustrates the fact that human judgments differ. It is not inconsistent with law, reflects the solemn judgment of the jury upon the conduct of the deceased as disclosed by the evidence, and it must stand.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

MORAN, Appellant, vs. MORAN, Respondent.

June 1—June 23, 1920.

Divorce: Opening judgment of divorce: Insanity of wife at time of trial: Subsequent recovery: Appealable order.

1. An order vacating a judgment of divorce and granting a new trial in the action is an appealable order within sub. (3), sec. 3069, Stats.
2. The statutory powers of the court over judgments of divorce are to be liberally exercised, and in a proceeding by a wife against her husband to procure the vacation of a judgment of divorce within one year after its rendition, the fact that the wife was mentally incompetent when the action was tried but was subsequently restored to sanity is persuasive ground justifying the trial court in reopening the case.

APPEAL from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The appeal is from an order vacating and setting aside the judgment of divorce entered in the action on December 20, 1918.

Plaintiff brought this action for absolute divorce on the grounds of cruel and inhuman treatment by personal service of the summons and complaint on the defendant June 18, 1918. On July 8, 1918, Hugo J. Trost, attorney for the defendant, was appointed her guardian *ad litem,* and on July 10, 1918, he interposed an answer in her behalf pleading a general denial and alleging, among other things, that the defendant was then confined to the county hospital for the insane.

The action was tried before the court. Plaintiff appeared in person and defendant appeared by her attorney and guardian *ad litem.* The state was represented by the assistant district attorney as divorce counsel. Judgment of absolute divorce was entered on December 20, 1918, the findings and judgment being approved by the assistant district attorney as divorce counsel.

On December 15, 1919, an application, based on affidavits of the defendant and her attorney and guardian *ad litem,* was made to have the judgment of divorce vacated and set aside on the following grounds: (1) that at the time of the entry of the judgment defendant was an inmate of the hospital for the insane; (2) that she is in destitute circumstances and solely dependent on her brothers for support and maintenance; and (3) that she has a good defense to this action.

The application was heard on December 18, 1918, and an order entered vacating and setting aside the judgment of divorce and granting a new trial. This is an appeal from such order.

The cause was submitted for the appellant on the brief of *Lorenz & Lorenz* of Milwaukee, and for the respondent on that of *Hugo J. Trost* of Milwaukee.

SIEBECKER, J. It is contended that the order sought to be reviewed is not an appealable order. The order grants a new trial of the action and hence is an order appealable to this court under the provisions of sub. (3), sec. 3069, Stats.

The claim is made that the trial court erred in awarding a new trial. Sec. 2374, Stats., provides:

"1. When a judgment of divorce from the bonds of matrimony is granted so far as it affects the status of the parties it shall not be effective until the expiration of one year from the date of the entry of such judgment; . . .

"2. So far as said judgment affects the status of the parties the court shall have power to vacate or modify the same for sufficient cause shown, upon its own motion, or upon the application of either party to the action, at any time within one year from the entry of such judgment, provided both parties are then living. . . . If the judgment shall be vacated it shall restore the parties to the marital relation that existed before the entry of such judgment."

It is declared in *White v. White,* 167 Wis. 615, 168 N. W. 704, respecting these statutory provisions:

"It is evidently the declared purpose and policy of these

statutes that until such year has passed the court still has absolute control, and up to the last moment, over the question whether the party seeking a divorce is entitled thereto."

This broad power of the court is to be liberally exercised in the administration of the laws of divorce. The grounds shown for vacating the judgment in this case are substantial and meritorious. The fact that defendant was mentally incompetent when the action was originally tried and is now mentally restored so that she is enabled to appear and testify, is a very persuasive ground justifying the trial court in reopening the case within the year and giving her a hearing. It is considered that the order vacating the judgment and directing a retrial of the issues is well founded and cannot be disturbed.

By the Court.—The order appealed from is affirmed.

PAUL, Respondent, vs. PFEFFERKORN, Appellant.

June 1—June 23, 1920.

Automobiles: Negligence: Collision at street intersection: Contributory negligence: Perverse verdict.

1. In an action for damages to an automobile in a collision with another automobile at a street intersection, the evidence is *held* to sustain a finding that plaintiff was not negligent.
2. A finding by the jury that the defendant sustained no damages, when it was undisputed that he sustained damages in the sum of $58.40, does not show that the verdict for plaintiff was perverse and should be set aside, the jury evidently understanding that defendant's negligence precluded recovery and the other findings being in accord with the evidence. *Miner v. Rolling,* 167 Wis. 213, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Action begun in the civil court of Milwaukee county to recover damages sustained in a collision with defendant's automobile. Defendant counterclaimed for damages to his

automobile. The collision took place November 25, 1917, at the intersection of Washington street and Ninth avenue. Plaintiff drove a Ford touring car north on Ninth avenue, and defendant drove a seven-passenger Chalmers car east on Washington street, and the collision took place at or near the center of the street intersections.

The jury found (1) plaintiff did not fail to exercise ordinary care in driving, managing, operating, or controlling his automobile as he approached and proceeded to cross the intersection of Ninth avenue and Washington street; (3) plaintiff kept to the right on Ninth avenue, going north as he approached Washington street; (6) when plaintiff first saw, or in the exercise of ordinary care should have seen, that a collision was probable, he did not fail to exercise ordinary care to avoid such collision; (8) plaintiff was not guilty of any failure to exercise ordinary care which proximately contributed to the collision; (9) defendant failed to exercise ordinary care in driving, managing, operating, or controlling his automobile as he approached and proceeded to cross the intersection of Ninth avenue and Washington street; (10) such failure to exercise ordinary care was the proximate cause of the collision; (11) when defendant first saw, or in the exercise of ordinary care should have seen, that a collision was probable, he failed to exercise ordinary care to avoid such collision; (12) such failure to exercise ordinary care was the proximate cause of the collision; (13) defendant was guilty of a failure to exercise ordinary care which proximately contributed to the collision; (14) plaintiff sustained damages in the sum of $1,515, and defendant's damages were "None."

The trial court reduced plaintiff's damages to $1,215 and entered judgment in his favor for such amount with costs. Upon an appeal by the defendant to the circuit court the judgment was affirmed, and from such judgment defendant appealed to this court.

O. W. Bow of Milwaukee, for the appellant.
Arthur Breslauer of Milwaukee, for the respondent.

VINJE, J. Plaintiff was driving north on Ninth avenue at a speed of from eleven to twelve miles per hour. When within thirty-five or forty feet from the point of collision he saw defendant's car coming east on Washington street about seventy or eighty feet from the point of collision and at a speed which he judged to be from twenty-two to twenty-five miles per hour. Just before the collision plaintiff increased his speed some, but defendant's car struck the left side of his car and practically demolished it. He testified he thought the safest way to avoid collision was by speeding up instead of slowing down, especially as he had the right of way. He thought defendant would slow up sufficiently to permit him to pass in safety. He turned to the right as far as he could before he was struck. The jury acquitted plaintiff of negligence, and this finding is challenged. The civil court approved the finding and so did the circuit court. We see no ground upon which it can be disturbed. On the contrary, it seems to be in accord with the facts as disclosed by the whole evidence in the case. It may be true that by an instant application of the brakes when plaintiff first saw defendant he could have prevented a collision. On the other hand, it seemed equally reasonable to assume that by speeding up some he could pass in safety, and the latter course is no doubt the one usually taken by the average prudent and careful driver. There is no evidence to show that defendant slowed his speed as he should or that he paid the least attention to plaintiff. Under such circumstances the challenged finding rests upon a basis too substantial for interference by an appellate court. The finding evidently was not made, nor is it sustained, on the mere ground that plaintiff had the right of way, but on the ground that, having the right of way, his conduct measured up to the standard of

ordinary care. *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *Zimmermann v. Mednikoff,* 165 Wis. 333, 162 N. W. 349; *Glatz v. Kroeger Bros. Co.* 168 Wis. 635, 170 N. W. 934.

It is undisputed that defendant sustained damages in the sum of $58.40, and yet the jury found none. This fact, it is argued, shows the verdict was perverse and should be set aside, claiming that the case differs from *Miner v. Rolling,* 167 Wis. 213, 217, 167 N. W. 242. We see no difference in the cases. Here the jury understood that defendant's negligence precluded recovery. The civil court so construed the reason for the jury's finding and the circuit court approved it. The *Miner Case* rules this. Besides, it is clear that the verdict otherwise is not perverse but in accord with the evidence.

By the Court.—Judgment affirmed.

STATE EX REL. CRAMER and others, Respondents, vs. BODDEN, Tax Commissioner, and others, Appellants.

June 1—June 23, 1920.

Taxation: Trade fixtures not assessable as real property.

Under secs. 1035, 1043, Stats. 1919, machinery placed within a building by a tenant for trade or manufacturing purposes is not a "fixture," and therefore not assessable as real property to the owner of the building.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The relators herein, *Harriet L. Cramer* and *John F. Cramer,* are and were prior to June 1, 1918, the owners in fee simple of lot 7, block 18, of the Third ward of the city of Milwaukee, upon which was situated a four-story brick building. Prior to June 1, 1918, the *Cramers* were stock-

holders, officers, and directors in the Evening Wisconsin Company, which carried on the business of publishing a newspaper and running a job-printing office. On May 31, 1918, the Evening Wisconsin Company sold its newspaper business and transferred all of its other property to *Harriet L. Cramer*. The *Wisconsin Printing Company* was organized in the latter part of May, 1918, and on May 31st *Harriet L.* and *John F. Cramer* leased to it certain portions of the brick building referred to for a term of five years; and the *Wisconsin Printing Company* purchased of *Harriet L. Cramer* all the machinery and stock used in the job-printing business which had been conveyed to her by the Evening Wisconsin Company. Since that time the *Printing Company* has been the sole owner of such machinery, using it in the job-printing business carried on by it in the leased premises. The machinery in question consists of ten cylinder presses, two cutting machines, two folding machines, four wire stitchers, and one sewing machine. Each of these machines is operated by electricity through a motor placed on the floor beside it, the power being furnished by another company. The machines and motors are bolted or screwed to the floors to prevent vibration. All the machines and motors can be removed from the building at any time by simply unscrewing the bolts and screws and cutting the connecting feed wires. The machinery of the *Wisconsin Printing Company* was assessed at $30,000 as real estate; the assessment was affirmed by the *Board of Review*. In a *certiorari* proceeding begun in the circuit court for Milwaukee county the action of the *Board of Review* was reversed, and the defendants appeal therefrom to this court.

For the appellants there was a brief by *Clifton Williams*, city attorney, and *Chas. W. Babcock*, assistant city attorney, and oral argument by *Mr. Babcock*.

Frank M. Hoyt of Milwaukee, for the respondents.

ROSENBERRY, J. The controversy in this case involves a construction of sec. 1035, Stats. 1919:

"The terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself but all buildings, including buildings on leased land and all fixtures, improvements thereon, rights and privileges appertaining thereto, and also private railroads and bridges."

Also sec. 1043, Stats. 1919:

"Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. . . . All buildings on lands under lease or permit, including buildings located on railroad right of way or on other lands not subject to local assessment, shall be assessed as real estate to the owners of such buildings, if known, otherwise as above provided. The tax thereon may be enforced in the same manner as other real estate taxes or by action of debt as prescribed by section 1107*a* for the collection of taxes on personal property."

The question is whether or not under these statutes the machinery described is a fixture. From an early day Wisconsin has had a liberal policy with reference to the right of a tenant to remove a trade fixture. *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 519; *Walker v. Grand Rapids F. M. Co.* 70 Wis. 92, 35 N. W. 332; *Corcoran v. Webster,* 50 Wis. 125, 6 N. W. 513. If the legislature had intended to use the word *fixture* in any other sense than that established in the law of this state, it would undoubtedly have used language appropriate for that purpose. There being nothing from which we can discover that the legislature intended to use the word in any different sense, we must hold that it was used in the sense in which it is ordinarily understood. Machinery, therefore, placed within a building by a tenant for trade or manufacturing purposes is not a fixture, and therefore not assessable under the statute as real property to the owner of the building. If

the legislature is desirous of destroying the right of offset of personal property tax against income taxes, it is very easy for it to use language which will make its intent clear and unmistakable. The legislature has had this statute under consideration, and it has been amended a number of times, and we discover nothing in the history of the statute which leads us to believe that the word *fixture* was used in any other than its accepted meaning.

By the Court.—Judgment affirmed.

STATE EX REL. MARINER, Executor, Respondent, vs. HAMPEL, County Clerk, etc., Appellant.
STATE EX REL. VOGEL, Respondent, vs. SAME, Appellant.
STATE EX REL. SMITH, Respondent, vs. SAME, Appellant.
STATE EX REL. PFISTER, Respondent, vs. SAME, Appellant.

June 1—June 23, 1920.

Taxation: Income of beneficiaries of trust: Income derived from property without the state.

Where the property of a corporation consisting of mines and lands in Michigan was transferred to trustees resident of Wisconsin, each beneficiary being a stockholder of the corporation and having the same interest under the trust agreement as he had in the corporation, and the rents received by the trustees after payment of expenses being paid to the beneficiaries, the money so received was not taxable under sub. 3, sec. 1087*m*—2, and sub. 5, sec. 1087*m*—10, Stats. 1919.

APPEALS from judgments of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The appeals are from judgments in *certiorari* actions entered on December 16, 1919, in the circuit court, reversing and setting aside a decision of the Wisconsin tax commission approving and affirming assessments made against the above-named petitioners on account of income received during the year 1917.

The petitioner in each of these actions is a beneficiary under a certain trust agreement. The sum of $70,000 was distributed in the year 1917 by the trustees to these beneficiaries, of which sum *John W. Mariner,* as executor of the estate of E. Mariner, deceased, received $17,500; Louise F. Vogel (the amount being assessed against her husband, *Fred Vogel, Jr.*) received $8,750; *Jesse Hoyt Smith* received $17,500; and *Charles F. Pfister* received $8,750. An assessment was made against each of these beneficiaries on account of the income received under the trust agreement. Objections to this assessment were filed before the income tax board of review of Milwaukee county, which objections were sustained. An appeal was taken by the assessor of incomes to the Wisconsin tax commission, which reversed the order and determination of the income tax board of review and reinstated the assessments made by the assessor of incomes. Actions were commenced by the petitioners in the circuit court for Milwaukee county to test the legality of such income assessments.

Upon trial of the case it appeared that the Pfister Land Company was incorporated in 1887 with a capital stock of $12,000. The stock of the company is still held by the same persons who organized it or by their heirs or legal representatives. The property of the corporation consisted of land and mines in the state of Michigan. On November 27, 1916, a trust agreement was entered into between the Pfister Land Company and *Charles F. Pfister, Jesse Hoyt Smith,* and *John W. Mariner,* as trustees, whereby the title to all of the lands owned by the Pfister Land Company located in the state of Michigan was transferred to the trustees, with practically the same powers with respect to the control and management of same as was theretofore vested in the Pfister Land Company. The beneficiaries under the trust are stockholders of the Land Company and each is given precisely the same interest under the trust agreement as he formerly owned in the Land Company.

The trust agreement sets forth the powers and duties of the trustees and the manner in which the business shall be conducted, and provides in addition:

"Except as above authorized to be expended, paid out or retained, all proceeds which shall come to the hands of the trustees from said property or from any use which shall be made thereof, or from any source whatsoever hereunder as received by the trustee, shall belong to and be the property of the beneficiaries hereunder, to be distributed and paid over to them in proportion to and in accordance with their respective interests as shown herein, or as same shall from time to time appear as hereinafter provided."

The circuit court reversed the determination of the tax commission and set aside the assessments made by the commission. These are appeals from such judgments.

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, and *Daniel W. Sullivan,* first assistant district attorney; and the cause was argued orally by *Mr. Brossard.*

For the respondents there was a brief by *Fawsett & Smart* of Milwaukee, and oral argument by *Charles F. Fawsett.*

SIEBECKER, J. The petitioners in each of these actions are the beneficiaries under the trust agreement referred to in the foregoing statement. As such beneficiaries they received from the trustees the total sum of $70,000 in the year 1917, this sum being the net proceeds which the trustees had received as rent from mines located in the state of Michigan. The trial court held that the amount so received by the petitioners under the trust agreement was income received by them from property located and business conducted without this state and therefore not subject to taxation under the state income tax law. It is the contention of the appellant that such income so received by petitioners was derived from business transacted within this state and subject to an in-

come tax. The argument is made that the proceeds from the mines paid to the trustees belong to them as such and that the beneficiaries acquired no title thereto until the trustees had paid all charges and disbursements for which such funds were liable in carrying out the objects and purposes of the trust, and that this in effect made the trustees the recipients of such income derived from property and business transacted without the state within the rule declared in *State ex rel. Arpin v. Eberhardt,* 158 Wis. 20, 147 N. W. 1016, and therefore the beneficiaries under the trust agreement were not the recipients thereof as income from sources without the state within the contemplation of the income tax law. The case of *State ex rel. Wis. T. Co. v. Widule,* 164 Wis. 56, 159 N. W. 630, is relied on as sustaining this contention. The point decided in that case is that a resident trustee of the state to whom is paid an income taxable in this state is, within the contemplation of sub. 5, sec. 1087*m*—10, Stats., the recipient of such income under sub. 3, sec. 1087*m*—2. The question there involved does not determine this case. The provisions of sub. 5, sec. 1087*m*—10, make the fiduciaries specified therein the representatives of their beneficiaries for the purposes of income taxation, and their activities in Wisconsin in conducting the trust affairs concerning property and business located without the state cannot be held as operating to transform the business of such trustees to a business conducted within this state. The fact that the income in question is derived from property located and business transacted without the state persists to the end, and under the trust agreement the proceeds thereof are so received by the beneficiaries under the income tax statute last above cited. This statute differs materially in the treatment of incomes in the hands of fiduciaries from those dealing with *dividends* distributed by a corporation out of its earnings or profits and paid to its shareholders, as applied in *Van Dyke v. Milwaukee,* 159 Wis. 460, 150 N. W. 509.

The decision in the *Van Dyke Case* is based on the ground that stock dividends were declared to be taxable income by the express terms of the statute. It is considered that the income paid the beneficiaries as the net proceeds of rentals of the Michigan mines under the trust agreement is received by them as income derived from sources without the state and is therefore not taxable under the state income tax law. Sub. 3, sec. 1087*m*—2.

By the Court.—The judgments appealed from are affirmed.

FEYRER, by guardian *ad litem*, Respondent, vs. DURBROW, Appellant.

June 1—June 23, 1920.

Automobiles: Pedestrian stepping into street: Negligence: Excessive speed: Failure to sound horn: Proximate cause: Contributory negligence.

1. In an action by a pedestrian for personal injuries received when struck by an automobile while he was attempting to cross a public street, a finding that defendant drove the automobile at an excessive rate of speed is *held* not to be supported by the evidence, though plaintiff, a boy, testified that it was going twenty-five or thirty miles an hour, where it ran only three or four feet after striking him and he did not see it until it was but two to seven feet from him.
2. Negligence of the driver could not be predicated on an excessive rate of speed, where the speed was not in excess of twelve or fifteen miles an hour.
3. The driver of an automobile is under no obligation to sound his horn as he approaches a street intersection.
4. The failure of the driver to sound his horn when approaching a street intersection could not have been the proximate cause of plaintiff's injury, where each discovered the other's approach at the same time.
5. A finding that defendant was negligent in not sooner discovering the presence of plaintiff in the street cannot be sustained where the plaintiff was in equally as good a position to discover the automobile as defendant was to discover him, and each discovered the other at the same time.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

Plaintiff, a newsboy fourteen years of age, was struck by an automobile driven by the defendant, and brings this action to recover damages. At about 5 o'clock in the evening of the 18th day of November, 1918, defendant was driving west along Galena street in the city of Milwaukee. It was a dark, damp, misty evening. About thirty-five feet east of the east crosswalk at the intersection of Galena and Fourteenth streets plaintiff attempted to hastily cross Galena street from north to south. When he was a few feet from the curb he discovered defendant's automobile coming towards him. He paused momentarily and then ran on across the street. When the boy paused the defendant turned to the left to avoid him, and they collided near the center of the street.

The case was tried in the civil court of Milwaukee county before a jury, which found, in the form of a special verdict, (1) that the defendant was operating his automobile at an excessive rate of speed at and immediately prior to the time of striking the plaintiff; (2) that the defendant failed to exercise ordinary care in operating his automobile at such excessive rate of speed; (3) that such want of ordinary care was the proximate cause of plaintiff's injury; (4) that the defendant failed to give any warning by sounding the horn on his automobile as he approached the intersection of Fourteenth and Galena streets; (5) that the defendant failed to exercise ordinary care in so failing to give warning of his approach by sounding his horn; (6) that such want of ordinary care was a proximate cause of plaintiff's injury; (7) that the defendant failed to have his automobile under proper control immediately prior to the time plaintiff was struck; (8) that the defendant failed to exercise ordinary care in so failing to have his automobile under proper con-

trol; (9) that such want of ordinary care was a proximate cause of plaintiff's injury; and (10) damages $250. From the judgment entered upon such verdict in favor of the plaintiff the defendant appealed to the circuit court for Milwaukee county, where the judgment was affirmed. From the judgment of the circuit court affirming the judgment of the civil court the defendant brings this appeal.

The cause was submitted for the appellant on the brief of *Martin J. Brennan,* attorney, and *Nicholas F. Lucas,* of counsel, both of Milwaukee, and for the respondent on that of *Raymond J. Cannon* of Milwaukee.

OWEN, J. Notwithstanding what was said in *Shortle v. Sheill, ante,* p. 53, 178 N. W. 304, decided herewith, concerning the finality of the verdicts of juries in cases of this nature, we are convinced that the verdict and judgment in this case are unsupported by a scintilla of evidence. The general situation presented by the facts is a typical and familiar one. The driver of an automobile is proceeding along a street. A pedestrian heedlessly steps from the curb directly in the path of the automobile. They discover each other at about the same time. The driver of the automobile promptly applies his brakes, the pedestrian halts momentarily, each is uncertain of what the other is going to do, both do the same thing, and the pedestrian is struck and injured. That is what happened in this case, as conclusively appears by the evidence of the plaintiff as well as of the defendant. While the jury found that the defendant drove the automobile at an excessive rate of speed, there is no evidence whatever to support this except that of the plaintiff, who testifies that the defendant was driving the automobile at twenty-five or thirty miles an hour. He admits, however, that when he first saw the automobile it was only from two to seven feet from him. That the automobile ran only three or four feet after striking the boy is conclusively

established. The boy had no experience that would enable him to judge of the speed of automobiles. But the best judge could not form a very accurate idea of the rate of speed at which an automobile but from two to seven feet away was bearing down upon him. The physical facts show that the automobile was brought to a stop within a very short distance from the point where it struck the boy. The pavement was damp. The boy discovered the automobile when he was but a few feet distant from the curb. The driver could not have discovered the boy much sooner, yet he brought the machine to a stop by the time the boy reached the center of the street.

The other testimony in the case is to the effect that the automobile was not going to exceed twelve or fifteen miles an hour, and the physical facts show that this must have been true. We do not think that the defendant's negligence, therefore, can be predicated upon excessive rate of speed. Neither can it be predicated upon his failure to blow the horn. While all the testimony in the case except that of the plaintiff is to the effect that he did blow the horn upon discovering the boy, we do not see how the conclusion can be reached that his failure to blow the horn was the proximate cause of the accident. In the first place, we know of no rule of law requiring the driver of an automobile to blow his horn as he approaches a street intersection. It is apparent that the boy could see the automobile coming as soon as the driver thereof could see the boy in the street. If the boy was not negligent in failing to discover the automobile, the driver of the automobile certainly was not negligent in failing to discover the presence of the boy in the street. That they discovered each other at about the same time is apparent. The boy momentarily stopped. This is testified to by the defendant and admitted by the boy. This no doubt marks the time when the boy discovered the automobile and, according to the testimony of the defendant, it also

marks the time when he discovered the boy. As he was under no obligation to sound the horn because of approaching the intersection of the crossing, in order for such failure to constitute the proximate cause of the accident it must be held that he should have sounded the horn immediately upon discovering the boy. This he said he did, but whether he did or not would seem to be immaterial, because the boy discovered him at the same time.

The jury found that the boy was not negligent in not discovering the automobile before he did, and as he was in just as good a position to discover the automobile as the driver thereof was to discover the boy, how can it be said that the latter was negligent in failing to discover the boy before he did? According to the testimony of the boy the automobile was from two to seven feet away from him when he discovered it. According to the defendant the distance was ten or fifteen feet. The fact that the automobile was brought to a stop within three or four feet from the place where it struck the boy indicates that the driver must have acted with promptness and that the car must have been under good control. In no view of the evidence can we find any support for the verdict. The same considerations that acquit the plaintiff of negligence must also acquit the defendant.

By the Court.— Judgment reversed, and cause remanded with instructions to enter judgment in accordance with this opinion.

STRAYER, Appellant, vs. GIMBEL BROTHERS, Respondent.

June 2—June 23, 1920.

Evidence: Parol evidence to explain ambiguity: Conversations with third person prior to written contract: Master and servant: Practical construction of agreement of employment: Effect.

1. In an action on a written contract of employment, testimony as to a conversation by plaintiff with a third person concerning the terms of his employment, some time before the execution of the contract, the third person taking no part in the negotiations, was inadmissible to explain any ambiguity in the contract.
2. A long course of dealing wherein the employer submitted and the employee accepted monthly statements showing the compensation to be paid, was binding on the employee as a correct interpretation by the parties of the ambiguous contract of employment.

APPEAL from an order of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

The appeal is from an order reversing a judgment of the civil court of Milwaukee county and ordering a new trial in the circuit court.

Plaintiff brought this action for a balance of commissions alleged to be due him as a piano salesman for the defendant company. He claimed there was due him a balance of $1,521 for commissions for the sale of pianos upon a basis of eight per cent. of the gross price of all pianos sold by him. He alleges a contract for eight per cent. gross upon the selling price of all pianos, with a deduction of twenty per cent. for pianos which were returned or taken back by the defendant company after the purchasers failed to make the payments or carry out their contracts of purchase. The employment was in writing as follows:

"Milwaukee, Jan. 16, 1916.

"I have this day entered into a weekly engagement with *Gimbel Brothers,* at $30 each week drawing account, eight per cent. basis, twenty per cent. for repossessions. I have no other contract. No. 38. JOHN W. STRAYER."

The trial court received the evidence of the plaintiff and of a Mr. Akers to explain the terms of this writing, as well as that of Mr. Forman, the superintendent of the store, who negotiated with plaintiff on the day this writing was signed.

The action was tried before a jury in the civil court and a verdict was returned in favor of the plaintiff. This verdict was set aside by the trial judge and a new trial ordered. A second trial was had before a jury, which brought in a special verdict awarding the plaintiff the sum of $1,446.75. The court ordered the plaintiff to remit $295.13 from the amount found by the jury or submit to a new trial. Plaintiff remitted the amount and judgment was entered for $1,151.62. Appeal was taken to the circuit court, which made an order reversing the judgment of the civil court and ordered a new trial in the circuit court. This is an appeal from such order.

For the appellant there was a brief by *Raymond J. Cannon,* attorney, and *A. W. Richter,* of counsel, both of Milwaukee, and oral argument by *Mr. Richter.*

For the respondent there were briefs by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter D. Corrigan.*

SIEBECKER, J. It appears that plaintiff on January 14, 1916, made a written application to *Gimbel Brothers* for employment as piano salesman, and on the following day the written memorandum of employment set forth in the foregoing statement was signed by him as a result of negotiations he had with B. J. Forman, the superintendent of defendant's store. This memorandum is treated as the contract between the plaintiff and defendant, and plaintiff bases his right to a recovery on it in this action. The civil court held this writing ambiguous and received parol evidence to explain its terms. Akers was a friend of plaintiff, who induced him to make the application to defendant for employ-

ment as a piano salesman. The conversation with Akers which was received in evidence took place several days before plaintiff negotiated with B. J. Forman as defendant's superintendent for the position of piano salesman. It is clear that Forman was the authorized representative of defendant to make this contract with plaintiff and that on January 15, 1916, he had negotiations with him which resulted in the written contract. It also appears that Akers did not participate in the negotiations between plaintiff and Forman. Under these facts and circumstances the holding of the circuit court that any conversation plaintiff may have had with Akers concerning the terms of his employment by defendant several days before plaintiff negotiated with Forman was incompetent and that its admission in evidence to explain any ambiguity in the written contract constitutes an error which requires that the verdict be set aside, is correct. These conversations so admitted were in effect an interpretation of the written contract, as plaintiff claims, and negatived the interpretation asserted by the defendant. The ruling in *Hammond v. Capital City M. F. Ins. Co.* 151 Wis. 62, 138 N. W. 92, and *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43, does not justify the admission of this prior conversation with Akers as proper and competent evidence to explain the terms of the written contract made by plaintiff with Forman.

The defendant contends that the court erred in not awarding judgment dismissing plaintiff's complaint upon the grounds that it is undisputed in this case that plaintiff throughout his employment accepted monthly statements from defendant showing that under the written contract he was entitled to a commission of eight per cent. on net sales. It is undisputed that the monthly statements showing plaintiff's sales and what credits for repossessions were to be charged against his sales were received and accepted by him without objection. This long course of dealing between the parties is of controlling weight in determining the correct

interpretation of the written agreement and must be accepted by the court as its correct interpretation by the parties. Such conduct is binding on plaintiff under the facts and circumstances of the case. This construction of the contract is also supported by the testimony of Forman to the effect that in the negotiations between himself and plaintiff resulting in the written memorandum of the contract on January 15, 1916, it was understood that the eight per cent. commission was to be allowed him on his net sales. This conversation the plaintiff does not contradict, and it harmonizes with his conduct in accepting monthly statements of his account on the eight per cent. net basis. These facts are verities in the case and entitled the defendant to a judgment dismissing the plaintiff's complaint.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with direction to enter judgment dismissing plaintiff's complaint upon the merits.

CLUNE, Respondent, vs. CATHOLIC ORDER OF FORESTERS, Appellant.

June 2—June 23, 1920.

Insurance: Tender of dues after notice of suspension from beneficial order: Overpayments made under mistake to be applied on member's account: Forfeiture upon change to more hazardous employment: Acceptance of dues as waiver.

1. Where a member of a beneficial order, without obtaining a permit from the order, engaged in a business which was a hazardous risk under the rules of the order, and paid double monthly dues, as he would have been required to do in case he had secured a permit, such payments during the time he had no permit would not have operated to prevent a forfeiture of the contract, had the order insisted upon it; but the order, by receiving such payments knowing the facts, waived the forfeiture.
2. Although the order, by receiving for a period of six months the double monthly dues, waived its right to forfeit the contract

because the member had not, in addition to paying double dues, secured the order's permit to engage in such business, yet, since he was required to pay such double dues only from the time the permit was granted him, he overpaid during such six months; and the order could not insist upon retaining such overpayments, they having been made under a mistake of fact, and was bound to account for them and apply them, to prevent a forfeiture, upon subsequent monthly payments until exhausted.

3. Where, after such member was notified of his suspension from the order because of nonpayment of dues, and his dues were tendered until the plaintiff, his wife, was informed by the order that he was no longer a member, she was under no duty to tender further dues.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action upon a benefit certificate for $2,000 issued by the defendant order in 1901 to the deceased husband of plaintiff.

The defense was that in May, 1916, the deceased was lawfully suspended from the order because of the nonpayment of his March, 1916, dues and that he had never been reinstated. The trial court took an accounting of payments made by the deceased almost from the time of the issuance of the certificate until his death, so far as the books of the company would permit, and found that in March, 1916, the deceased had overpaid the order sufficiently to carry him many months beyond the time of his suspension. The court also found that during almost the whole life of the certificate the deceased had paid when long in arrears without any intimation that by so doing he had incurred any suspension, and held the order estopped from claiming a forfeiture even if the March, 1916, dues were not paid. Judgment for $2,000 less $28.15 due the order was entered in favor of plaintiff, and the defendant appealed.

For the appellant there was a brief by *Morgan & Benton* of Appleton, attorneys, and *E. S. Cummings* of Chicago, of counsel, and oral argument by *John Morgan.*

L. P. Fox of Chilton, for the respondent.

VINJE, J. We find it unnecessary to discuss many of the questions presented by the briefs of counsel for the respective parties or to set out in detail all the facts upon which they rely, because of the existence of certain facts that are uncontradicted and control the case. No other prior ground of suspension than the delinquency of the March, 1916, dues is urged. If that fails then the suspension was unlawful.

It is undisputed that Clune went into the saloon business July 1, 1915, and from such date till January 1, 1916, when he received a permit from the order to engage in such "hazardous risk," he paid double monthly dues of $6.52 each. Under the rules of the order he was required to pay such dues only from the time the permit was granted him. The result is he overpaid for a period of six months and would not have been in arrears had he made no payments from January 1, 1916, to the time he was suspended. On the other hand, that he made payments up to March, 1916, is conceded by defendant. This item of overpayment alone shows that his dues were fully paid for March, 1916, and that he was unlawfully suspended. True, as stated by the trial judge, the overpayments during the time he had no permit did not operate to prevent a forfeiture of the contract because he had no permit had the order insisted upon it. But it did not. It received the payments knowing the facts and must be deemed to have waived the forfeiture. It could not, however, insist upon retaining the overpayments without giving him credit for them. Such payments were made under a mistake of facts and it was the duty of defendant to account for them. *Peterson v. Stoughton State Bank,* 78 Wis. 113, 47 N. W. 368.

In view of this state of the case we find it unnecessary to go back prior to July 1, 1915, in the account. After he was notified of his suspension, dues were tendered until plaintiff was informed by the order that her husband was no longer a member of it. From that time she was under no

duty to tender further dues. *Langnecker v. Grand Lodge A. O. U. W.* 111 Wis. 279, 87 N. W. 293; *J. I. Case T. M. Co. v. Johnson,* 140 Wis. 534, 537, 122 N. W. 1037; *Baumann v. Metropolitan L. Ins. Co.* 144 Wis. 206, 128 N. W. 864.

By the Court.—Judgment affirmed.

STATE EX REL. OSHKOSH COUNTRY CLUB, Respondent, vs. PETRICK, Town Clerk, Appellant.

June 2—June 23, 1920.

Taxation: Assessment of real estate of golf club: Improvements: Basis of appraisal.

1. The statutory rule that property shall be assessed "at the full value which could ordinarily be obtained therefor at private sale" requires that property shall be assessed with reference to purposes for which it may be sold rather than the purposes to which it presently may be devoted.
2. In assessing the real estate of a country club for purposes of taxation, money expended in improving the property for golf purposes should not be considered, but it must be appraised with reference to its value for farming purposes. *State ex rel. Gisholt M. Co. v. Norsman,* 168 Wis. 442, distinguished.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Certiorari to review the proceedings of a board of review. The assessor for the town of Black Wolf, Winnebago county, assessed the property of the *Oshkosh Country Club* for the year 1919 at the sum of $30,000, the real estate being valued at $25,000 and the improvements thereon at the sum of $5,000. Objection having been made before the board of review, the said assessment was reduced to $27,500, the real estate being valued at $22,500 and the improvements thereon at $5,000. The property consists of sixty-seven acres of land laid out as a golf course. The improvements consist of a club house, caddie house, tool

shed, and water pressure. The property was purchased in 1917 for $10,500. At that time the improvements consisted of a good farm, dwelling house, large barn, and small shed. The dwelling house was remodeled into a club house at an expense of $10,000. The evidence before the board of review showed that the land was worth not to exceed $200 an acre for farming purposes, and the improvements around ten or eleven thousand dollars. The officers of the club did not object to an assessment of $25,000. It also showed that, including the purchase price of $10,500, upwards of thirty-five or thirty-six thousand dollars had been expended by the club in placing the property in its then condition. The circuit court entered judgment reducing the assessment to $25,000, from which the town appealed.

For the appellant there was a brief by *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh, and oral argument by *E. J. Dempsey.*

For the respondent there was a brief by *Williams & Williams* of Oshkosh, and oral argument by *George E. Williams.*

OWEN, J. The essential difference between the parties is whether moneys expended by the club in improving the property for golf purposes can be taken into consideration in valuing the same for purposes of taxation. It is the contention of the owners that the real estate should be assessed for such sum as will represent its value for farm purposes. The theory of the assessing officers is that the value of the property as a whole, including the real estate and improvements thereon, should bear some relation to the amount expended to place the property in its present condition, and as a basis for the assessment they first ascertained the amount of such expenditures and, after allowing a liberal depreciation, fixed the amount of the assessment as above stated. In doing so they evidently had in mind the rule

sanctioned by this court in *State ex rel. Gisholt M. Co. v. Norsman,* 168 Wis. 442, 169 N. W. 429. There is this difference between the property here under consideration and the property involved in the *Gisholt Case:* In the *Gisholt Case* the property was devoted to manufacturing purposes and the company was a going concern with an established business. That it could be sold as such at private sale was not questioned. But because sales of such property were few and far between (as testified to by the president of the company), it was ruled that the original cost of the property less depreciation might be considered in fixing the value thereof for taxation purposes. Here the property has been improved for the special gratification of its owners and is devoted to the recreation and pleasures of the members of the club.

It is not at all unusual for the owner of property to expend large sums of money in fitting it up to suit his personal fancy. Money so expended does not necessarily add to its value for taxation purposes, under the rule of our statute, which requires that property shall be assessed "at the full value which could ordinarily be obtained therefor at private sale." Sec. 1052, Stats. This requires that property shall be assessed with reference to purposes for which it may be sold rather than the purposes to which it presently may be devoted.

It is a matter of common knowledge that there is no sale for a golf course in or adjacent to a city of the size of Oshkosh. Should the club disband or abandon the undertaking the property would have to be sold for farming purposes. It could not be sold as a golf course. In assessing it for taxation purposes, therefore, it must be appraised with reference to its value for farming purposes. The evidence shows that this does not exceed $14,000 for the land. By no process or calculation can the assessment of $27,500 be justified. Inasmuch as the officers of the club

did not object to an assessment of $25,000, the circuit court fixed the assessment at that sum. We find no evidence to justify a higher assessment, and the judgment of the circuit court should therefore be affirmed.

By the Court.—Judgment affirmed.

CITY OF OSHKOSH, Respondent, vs. EASTERN WISCONSIN ELECTRIC COMPANY, Appellant.

June 2—June 23, 1920.

Street railways: Annual payments required by city for use of streets: Revenue-producing measure or compensation for wear and tear: Validity of condition: Surrender of franchise: Indeterminate permit: Effect on condition.

1. Under sec. 1863, Stats., as it existed in 1903, it was within the power of a city to refuse to grant any privilege to an interurban railway to enter upon and use its streets; and where the city incorporated in a franchise granted to such a corporation a term requiring payment of $35,000 in thirty-five annual instalments, and such franchise was accepted by the railway company, such condition became as much a part of the ordinance as did the privilege exercised by the railway company in using the streets.
2. It not clearly appearing from the pleadings, it will not be presumed that the provision for an annual payment was a revenue-producing measure rather than compensation for the wear and tear on the bridges and streets of the city, and therefore the provision will not be treated as one beyond the power of the common council to impose. *Milwaukee v. Milwaukee E. R. & L. Co.* 147 Wis. 458, and *Milwaukee E. R. & L. Co. v. Milwaukee,* 167 Wis. 384, distinguished.
3. The procuring of an indeterminate permit on the surrender, under sec. 1797*t*—3, Stats., by an interurban railway of a franchise granted in 1903 by a city under sec. 1863, requiring payment of $35,000 in thirty-five annual instalments as compensation for using the streets, did not relieve the railway company of the obligation to pay such instalments. *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, and *Wisconsin T., L., H. & P. Co. v. Menasha,* 157 Wis. 1, distinguished; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, followed.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Plaintiff sues to recover the sum of $1,000 alleged to be due July 1, 1917, from the defendant as successor to the Eastern Wisconsin Railway & Light Company, pursuant to the terms of a certain ordinance granted to and the acceptance thereof by such predecessor in 1903. Defendant answered, and plaintiff's demurrer to such answer was sustained by the trial court.

The following are the facts:

November 10, 1903, the common council of plaintiff granted to the Eastern Wisconsin Railway & Light Company a franchise to extend its interurban electric railroad from the city of Fond du Lac into the city of *Oshkosh.*

The ordinance granted the right to lay tracks and operate its cars upon certain streets in the city of *Oshkosh* and over and upon a bridge on Main street in said city.

Among the terms of said ordinance was a provision by which the said Eastern Wisconsin Railway & Light Company, its successors and assigns, was to pay the city of *Oshkosh* the sum of $35,000 in annual payments of $1,000 on or before the 1st day of July of each of the following thirty-five years.

January 19, 1904, the said Railway & Light Company by its officers accepted said franchise by a writing which contained, among other things, the following:

"And the said Eastern Wisconsin Railway & Light Company does further specifically agree and bind itself, its successors and assigns, to the payment of the full sum of $35,000 as provided in said ordinance, that is to say, does hereby agree to pay said sum in equal annual instalments of $1,000, each instalment to be paid on or before the 1st day of July in each year during the term of said franchise."

Such annual payments were made up to and including July 1, 1916.

It is alleged in the complaint that the consideration for

the annual payment of $1,000 so provided for was agreed to be for the use of said streets and to partially compensate the plaintiff for the wear and tear on said Main-street bridge resulting from the operation of said interurban cars over said bridge. No reference is made in the amended answer of defendant to the foregoing allegation other than as may be embraced in the general denial.

March 1, 1917, the defendant *Eastern Wisconsin Electric Company* succeeded to the rights of the Eastern Wisconsin Railway & Light Company under the franchise aforesaid, and by purchase became the owner of the property then owned by said Eastern Wisconsin Railway & Light Company, including the interurban railway, and has operated and intends to continue operating the same in the future.

On March 8, 1917, the defendant surrendered such franchise so acquired by it together with others, and received by operation of law, in lieu of said franchises, an indeterminate permit under sec. 1797*t*—3, Stats.

Defendant alleges that it is now conducting and operating its street and interurban railway business in the city of *Oshkosh* by virtue of said indeterminate permit only and not by virtue of the foregoing or any franchise, license, or permit granted by any ordinance of the city of *Oshkosh.*

To the amended answer the plaintiff demurred, and defendant has appealed from the order sustaining such demurrer.

For the appellant there was a brief by *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh, attorneys, and *Charles McPherson* of Grand Rapids, Michigan, of counsel, and oral argument by *E. J. Dempsey.*

Frederic J. Eaton of Oshkosh, for the respondent.

ESCHWEILER, J. The defendant insists, first, that the plaintiff then had no lawful authority to impose as a condition for the privilege granted by the franchise of Novem-

ber, 1903, the requirement of the promise by the street railway company to pay the $35,000 as in said ordinance contained and that the stipulation therefor was consequently null and void; and secondly, that by its surrender of the franchise here in question, together with all other franchises that it then held in March, 1917, and the procuring thereby by operation of law an indeterminate permit, by virtue of sec. 1797*t*—3, Stats., such condition in the franchise, even if originally valid and binding, became null and void.

At the time of the granting and accepting of the franchise in question the final clause of sec. 1863, which is a statute relating to the extension of the lines of interurban railways into adjoining municipalities, read as follows:

"In any city or village the consent of the common council or board of trustees shall be given by ordinance, and upon such terms and subject to such rules and regulations and the payment of such license fees as the common council or board may from time to time prescribe; provided, that the common council or board shall not alter or change the license fee prescribed for such corporation, oftener than once in each five years."

It was within the power of the common council to absolutely withhold from granting any privilege to such interurban railway to enter upon and use the streets of said city. Or in case plaintiff elected to grant such permission, it might incorporate with the terms of such permission or franchise certain terms, rules, and regulations. Having incorporated such, it then became optional with the interurban railway to accept or reject such ordinance as it was then adopted and presented. The city in this instance did incorporate in such franchise a term requiring the payment of $35,000 in thirty-five annual instalments, and it was within the power delegated to it by the section above quoted so to do. Having been expressly accepted by the street railway, such condition became as much a part of the ordinance as did the privilege exercised thereunder by the railway company in using the streets of said city. This conclusion is clearly within the

former decisions of this court. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 26, 129 N. W. 925; *State ex rel. West Allis v. Milwaukee L., H. & T. Co.* 166 Wis. 178, 164 N. W. 837; *Superior v. Duluth St. R. Co.* 166 Wis. 487, 165 N. W. 1081.

Upon the pleadings as they stand we cannot now say as a matter of law that it clearly appears or is to be presumed that the provision of the franchise of November, 1903, and specifically included in the written acceptance of January, 1904, for the annual payment of $1,000, was a term or condition inserted as a revenue-producing measure rather than as a provision for actual compensation for the wear and tear on the streets and bridges of the city by such use. Such being the position, this provision cannot be treated as one beyond the power of the common council to lawfully require as a condition of the franchise becoming operative on the ground asserted by appellant, that the authority to tax or license such railways for revenue had been taken away by prior legislation, as was held to be the case with reference to the license fees involved in the cases of *Milwaukee v. Milwaukee E. R. & L. Co.* 147 Wis. 458, 133 N. W. 593, and *Milwaukee E. R. & L. Co. v. Milwaukee,* 167 Wis. 384, 167 N. W. 428..

Upon its second proposition defendant strongly urges that, having duly surrendered all the rights and privileges it acquired as successor to the original grantee of the franchise of 1903 and having received by such surrender the indeterminate permit authorized by the statute, it thereby became absolved from any and all obligations that may have theretofore existed on its part or that of its predecessor to the city of *Oshkosh* under the said franchise.

The surrender of its franchise in this case was made by the defendant under sec. 1797*t*—3, Stats., the final clause whereof is as follows:

"The filing of such declaration shall be deemed a waiver by such street railway company of the right to insist upon

the fulfilment of any contract theretofore entered into relating to any rate, fare, charge or service regulated by sections 1797—1 to 1797—38 of the statutes, as amended."

It insists that this surrender clause just above quoted under which it acted in the instant case is substantially the same as the surrender clause in sec. 1797*m*—77, being the one under which the public utility furnishing gas and electricity to the city of La Crosse surrendered its charter, and that therefore the situation here is ruled in favor of the defendant's contention by the decision involving the surrender in the La Crosse case (*La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530). That case, however, dealt with what was held to be a public-revenue feature of the former franchise so surrendered by the La Crosse company and not a franchise provision such as we have already determined in this case is here present. The attempted analogy, therefore, between the *La Crosse Case* and this must fail in that regard. Furthermore, the substantial difference between the franchise held by the public utility such as the gas company in that case involved obtained under sec. 1780*b* as it stood at the time of the franchise to such public utility, and a franchise granted under the section here involved (sec. 1863), is expressly and carefully pointed out in the *La Crosse Case* and also by its express reference to the case of *Manitowoc v. Manitowoc & N. T. Co.,* found also in 145 Wis. 13, 129 N. W. 925.

We shall not restate here what appears in those two cases on this same subject. This case is controlled by the *Manitowoc Case, supra,* and not by the *La Crosse Case.*

The same want of analogy in the instant case with the *La Crosse Case* is equally apparent from a consideration of the decision of this court in *Wisconsin T., L., H. & P. Co. v. Menasha,* 157 Wis. 1, 145 N. W. 231, also relied upon by appellant. What has just been said with reference to the *La Crosse Case* applies equally as well to the *Menasha Case.*

It follows that the circuit court was right in sustaining the plaintiff's demurrer to defendant's amended answer.

By the Court.—Order affirmed, and action remanded for further proceedings according to law.

SCHULTZ, Respondent, vs. ANDREWS & COMPANY, Appellant.

June 3—June 23, 1920.

Corporations: Sale of corporate stock: Representation as to value by seller: Reliance on statement by purchaser: Rescission of contract: Explanation of delay: Evidence: Proof of market value of stock: Pleading: Inconsistent causes of action: Waiver of objection by failure to demur.

1. In an action to recover the purchase price of corporate stock alleged to have been sold under false representations, a statement by the seller that the stock was sold at $8 a share in order to make future business friends, when it was worth $13.50 per share on the Chicago market, is *held,* in view of the circumstances, one upon which the purchaser was entitled to rely.
2. Where it appeared that the purchaser did not rescind the contract of purchase for five months, evidence that the conduct of the seller was a continuing tacit assurance that the stock could be resold at a profit made it a jury question as to whether plaintiff acted with reasonable promptness.
3. Testimony of defendant's manager that the market was what defendant made it, is sufficient to relieve plaintiff from the burden of proving the value of the stock on the market at the time of the purchase.
4. Where the complaint set forth one cause of action for damages for fraudulent representation and another for recovery of money paid after rescission of the contract, failure of defendant to demur is a waiver of the objection that the causes of action are inconsistent.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover money, paid upon the purchase of corporate stock, upon rescission because of fraudulent repre-

sentations. The defendant is a corporation engaged in the buying and selling of stocks and bonds and at all times hereinafter mentioned had an office in the city of Milwaukee. Plaintiff lived at Cato, Wisconsin. On October 26, 1917, the manager of the defendant at Milwaukee called plaintiff on the telephone and solicited him for the purchase of corporate stock of the Empire Tire & Rubber Company. He offered to sell it to him for $8 per share and represented, according to plaintiff's claim, that it was worth $13.50 on the Chicago market; that the stock was offered at $8 in order to make future business friends; that the purchase of 212 shares of stock would require a cash payment of $696, and that the balance need not be paid for ninety days, at which time the stock could be sold at a nice profit. In other words, according to plaintiff's contention, in order to induce him to purchase the stock at $8 a share it was represented that it was worth $13.50 on the Chicago market on that day, and the defendant guaranteed that it could be disposed of inside of ninety days at a profit. Plaintiff purchased the 212 shares, paid $696 therefor, and a few days later took thirteen shares more, so that he had a block of 225 shares. On the 13th day of November plaintiff wrote the defendant stating that he had received information from Chicago that the stock was listed for sale at $4 per share. The defendant replied that if such was the fact it was probably because a brokerage house in Chicago had been able to pick up a small block of the stock from some client who was in need of money and sacrificed his stock to get it; that defendant was the underwriter of the issue and had full control of it and that no considerable block of the stock could be purchased at any such figure, and stated further that

"They are simply using this as a leader, and we feel quite sure that you will never regret having taken on this stock at the $8 figure, as we firmly believe that it is one of the greatest issues that we have ever handled, and we are using

it as a stepping stone to future business with our new clients."

On January 28, 1918, plaintiff wrote defendant as follows:

"If there is any possibility for you to fulfil your promise, that is to sell my stock at a profit. If you can do this I will have more confidence in your ability, and would be willing to gamble a little more on your advice."

To which the defendant replied:

"I am in receipt of your letter of January 28th and beg to say that we have made note of your order to sell 225 shares of Empire Tire & Rubber Corporation common stock at $8.50 per share. As soon as we are able to move the stock at the above figure we will be very glad to notify you."

Nothing further occurred until April 6, 1918, when plaintiff's attorneys wrote defendant that plaintiff rescinded the contract of purchase because of fraudulent representations and demanded the return of the $696 paid upon the stock. Thereafter this action was commenced.

The complaint sets up two causes of action, one to recover the $696 by treating the contract as rescinded, and the other to recover the difference between the actual value and the represented value of the stock.

The case was tried before a jury and the following special verdict was returned: (1) That on October 26, 1917, the defendant by its agent, Henry P. Dinter, represented to the plaintiff that each share of the stock of the corporation known as the Empire Tire & Rubber Corporation was on that day of the value of $13 in the market; (2) that that representation was made to the plaintiff by said agent as the statement of a fact and not merely as an opinion relating to the value of said stock; (3) that said representation was false; (4) that the representation was made by said agent for the purpose of inducing the plaintiff to buy from the defendant 212 shares of said stock;

(5) that in buying said 212 shares of stock from defendant the plaintiff relied on said representation as being true; (6) that the plaintiff was induced by said representation to purchase said 212 shares of stock from defendant; (7) that in relying upon said representation the plaintiff did not fail to exercise ordinary care; (8) that the value per share of said stock in the market at each of the following dates, namely, October 26, 1917, January 26, 1918, and January 28, 1919, was: October 26, 1917, $4 per share; January 26, 1918, $3.50 per share; and January 28, 1919, $2.75 per share; (9) that the plaintiff notified the defendant within a reasonable time that he elected to rescind the contract for the sale of said stock; (10) that on October 26, 1917, the said defendant by its said agent agreed with the plaintiff that if he would purchase from defendant said 212 shares of stock the defendant would resell the same for the plaintiff within ninety days after that date at a sum exceeding $8 per share; and (11) that on November 5, 1917, said defendant by its said agent agreed with plaintiff that if he would purchase from the defendant thirteen additional shares of said stock the defendant would resell the same for the plaintiff within ninety days after October 26, 1917, at a sum exceeding $8 per share. On this verdict judgment was rendered in favor of the plaintiff and against the defendant for $696, from which judgment defendant brings this appeal.

For the appellant there was a brief by *Nash & Nash* of Manitowoc and *Samuel Shaw Parks* of Chicago, and oral argument by *Mr. Parks.*

For the respondent there was a brief by *Hougen, Brady & Meyer* of Manitowoc, and oral argument by *A. L. Hougen.*

OWEN, J. Unless the verdict is unsupported by the evidence or tainted with error it supports the judgment. *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790; *Karls v. Drake,* 168 Wis. 372, 170 N. W. 248; *Swoboda v. Rubin,*

169 Wis. 162, 170 N. W. 955. We have had some doubt as to whether the plaintiff was justified in relying upon the representation that the stock was worth $13.50 per share on the Chicago market upon the day of its purchase. Without any explanation, the statement would seem sufficient to put the most credulous upon inquiry. According to the testimony of plaintiff, however, he asked why defendant was not selling it on the Chicago market instead of offering it to him at $8 if the fact was as represented, to which the defendant's manager replied that they had the stock, which they were able to sell at $8 per share, and that they were using it for the purpose of making future business friends. The jury evidently accepted this explanation, and by its answer to the seventh question found, in effect, that plaintiff was entitled to rely thereon. In view of the fact that business concerns customarily expend large sums of money in advertising, and otherwise, for the purpose of extending their business and increasing their business acquaintances and friendships, we cannot say that the finding of the jury in this respect was not justified. While the circumstance is rather unusual, we cannot say that the plaintiff was not warranted in accepting, and relying upon, the assurance that the prospect of future business was the motive which prompted the defendant to sell the stock to him at $8 per share.

It is to be noted, also, that plaintiff did not rescind the contract of purchase until April 6, 1918, more than five months after the contract of purchase was made. It is claimed by the appellant that plaintiff's letter to it under date of November 13th indicates that he had discovered the falsity of the representations on that date, and that he should promptly have rescinded upon the discovery of the fraudulent representations, and that a rescission on April 6th following was too late as a matter of law. Ordinarily this would be true, but we think the following circumstances make the question of whether he acted with reasonable

promptness one for the jury: First, there is the reply of the defendant to plaintiff's communication of November 13th. In this letter it gave him assurance that if there were any instances of sales of the stock at $4 per share they were isolated ones and the result of financial necessities. The letter, taken as a whole, was very reassuring and was well calculated to impress the plaintiff with the thought that his information was erroneous, and that, after all, his stock was as represented. Then, too, it is to be remembered that *Andrews & Company* guaranteed that at the expiration of ninety days the stock could be sold at a nice profit. In reliance upon this feature of the contract, plaintiff, on the 28th day of January, requested *Andrews & Company* to make sale of the stock, and on January 30th they notified him that they had noted his order for sale of the stock at $8.50 per share. While their communication did not give him assurance of a speedy sale, neither was there any intimation of the hopelessness thereof. The act of the defendant in listing the stock for sale at $8.50 justified the plaintiff in awaiting their further advices in the matter and relieved him from taking immediate action in the nature of a rescission. In fact, there is no evidence that at that time plaintiff knew the facts concerning the real value of the stock, but, on the contrary, it tends to show that he was still relying upon the assurances given him and the representations made to him by the defendant. At no time between January 30th and April 6th did defendant advise plaintiff that a sale of the stock for $8.50 could not be secured. This conduct on the part of the defendant was really a continuing, tacit assurance on its part that the stock could be disposed of at a profit. This is especially true in view of the fact that the defendant made no demand for the payment of the balance due on the stock, which became due ninety days from the date of the contract of purchase. Under these circumstances, we think it was for the jury to say whether plaintiff acted with reasonable promptness in rescinding the

contract of purchase, and its finding in this respect cannot be disturbed.

Appellant makes the further point that the plaintiff failed to prove that the stock was not worth $13.50 on the Chicago market on October 29, 1917. It is true that there is no evidence in the case showing the value of the stock on the Chicago market on that day. The deposition of the defendant's Milwaukee manager, however, was taken otherwise than as a witness under the provisions of sec. 4096, Stats., and read in evidence. He testified that in October, 1917, he was manager of the defendant's office at Cleveland; that the market for the Empire Tire & Rubber Company stock was made through defendant's sales of it. The market was running at their asked price in October, 1917, from $7.50 to $8 and that to his knowledge the highest price paid for this stock up to October 29, 1917, was $9. In view of this testimony of the manager of the defendant's Milwaukee office, we think it was unnecessary for plaintiff to prove the value of the stock on the Chicago market on the day of purchase. It appears from his testimony that the market was what *Andrews & Company* made it, and that up to the day of the contract of purchase it had not been above $9 anywhere. If the defendant was prejudiced by this testimony it was within its power to show what the value of the stock was on the Chicago market on the day in question. This it failed to do, and the inference is irresistible that it was neither $13 nor $13.50.

Appellant further asserts that there is no evidence in the case to show that the stock was represented to be of the value of $13 on the Chicago market, and it points out that the evidence of the plaintiff is to the effect that it was represented to be $13.50. The plaintiff did so testify. The allegation of the complaint, however, is to the effect that it was represented to be of the value of $13. In view of this allegation of the complaint the court inserted the sum of $13 in the first question of the special verdict instead of

$13.50, and explained to the jury his reasons for doing so and told them to answer the first question "Yes" if they found that the representation was made that the stock was selling on the Chicago market at either $13 or $13.50. There is nothing substantial to this contention of appellant.

As mentioned in the statement of facts, the complaint sets forth two causes of action: one for damages because of the fraudulent representation, and the other for the recovery of the money paid, upon rescission of the contract. At the close of the evidence the defendant moved that the plaintiff be required to elect upon which issue he would go to the jury. The court denied the motion. This is assigned as error. It is true that the two causes of action are inconsistent, because one treats the contract as an existing one and the other treats it as having been rescinded and nonexistent. This was urged upon the lower court as ground for a new trial, and the learned trial judge pointed out that the objection should have been raised by demurrer to the complaint and that it was waived by failure to demur. This disposition of the matter is sustained by the plain provisions of the statutes. See secs. 2649, 2654, Stats.

Error is assigned by appellant because of failure to give instructions requested and the giving of instructions excepted to. We fail to find any error in such respect, and it seems unnecessary to treat such assignments in detail. We find no reversible error, from which it results that the judgment should be affirmed.

By the Court.—Judgment affirmed.

WILL OF HARKER.

June 3—June 23, 1920.

Courts: Probate of the estates of nonresidents: Authority of county court: Construction of will.

1. A county court having admitted the will of a nonresident to probate on a petition alleging the existence of creditors residing in Wisconsin and property within the state, its authority in the premises was limited to the administration of that part of the estate necessary to satisfy the claims of Wisconsin creditors, and, there being no Wisconsin creditors, an order attempting to construe the will was erroneous.
2. The duties of trustees under a will are to be defined by the court of domiciliary administration.

APPEAL from an order of the county court of La Fayette county: J. B. SIMPSON, Judge. *Reversed.*

Construction of will. John W. Harker died testate February 8, 1916, and was at the time of his death a resident of Council Hill, Jo Daviess county, Illinois. His will was duly admitted to probate in the county court of Jo Daviess county on March 17, 1916. The will created a certain trust for the benefit of an incompetent son, and *George Kirkpatrick* and *Curtis Harker,* the trustees named in the will, duly qualified and accepted the trust. The inventory showed a small amount of personal property, lands in North Dakota, and 160 acres of land in La Fayette county, Wisconsin. The clause of the will construed is as follows:

"I give, devise, and bequeath to *George Kirkpatrick* of Minot, South Dakota, and *Curtis Harker* of Dubuque, Iowa, in trust for my son, *John C. Harker,* all the rest, residue and remainder of my property of every kind and nature, both real and personal, and wherever situated, said trustees to pay to my said son the income derived from said property semi-annually during the term of the natural life of my said son. I further authorize and empower my said son to demand and receive from said trustees not to exceed the sum of $200 annually of the principal sum so held in trust by

them. Said trustees are further authorized to sell any real estate which may be included in said trust and convert the same into cash at any time they find it necessary or deem it expedient in carrying out this trust."

April 24, 1917, Belle Quinlan was appointed guardian of the incompetent son, *John C. Harker,* and July 3, 1918, she filed in the county court of La Fayette county a petition for the appointment of an administrator with the will annexed of the estate of John W. Harker. September 4, 1918, a guardian *ad litem* for *John C. Harker* was appointed, notice to creditors was given, and on April 2, 1919, *W. B. Vail* was appointed administrator with the will annexed in the ancillary administration of the estate of John W. Harker, and duly qualified by giving bond. *Vail,* as administrator with the will annexed, filed his petition July 2, 1919, for the construction of the will. Appraisers were appointed, but no inventory was returned or filed in the county court of La Fayette county. It is conceded by all parties that in the domiciliary administration proceedings in the county court of Jo Daviess county, Illinois, the La Fayette county lands and the North Dakota lands had been sold by the trustees prior to the time application was made for the construction of the will. Subsequently an inventory was made which showed no other estate than the 160 acres of land before referred to. Upon the petition for a construction of the will the court held that one third of the estate is granted to the widow absolutely; that the remainder of the estate is devised to the trustees for the benefit of the incompetent son, subject to the residuary clause; that the trustees ought to pay the income derived from said estate in semi-annual payments to *John C. Harker,* the son; that the said son has the right to receive from the said trustees the sum of $200 per year in addition to said income; that the trustees have the control of that part of the estate only which is bequeathed to said son; and that so far as that income and the $200 annual payment is concerned, their duty ends when

such payments are made to the party entitled to receive the same; that said *John C. Harker* has been adjudged incompetent, and that Belle Quinlan is his duly appointed and qualified and acting guardian; that such guardian has the right to receive the income of the estate devised to her ward and to demand the payment of the $200 annually, as bequeathed in the will; that the said guardian and not the trustees under the will is the trustee of the estate of such incompetent son. From such order the trustees appeal.

For the appellants there was a brief by *Fiedler & Fiedler* and *R. T. Jackson,* all of Mineral Point, and oral argument by *Mr. E. C. Fiedler* and *Mr. Jackson.*

For the respondent there was a brief by *Kopp & Brunckhorst* of Platteville, attorneys, and *C. F. McDaniel* of Darlington, guardian *ad litem,* and oral argument by *L. A. Brunckhorst.*

ROSENBERRY, J. It is contended by the appellants, and we think correctly so, that the county court was in error in attempting to construe the will in question. It is contended that the court had no jurisdiction to enter the order construing the will. No doubt the court had jurisdiction in the broad and comprehensive sense in which that term is generally used. The construction of the will was an erroneous exercise of the court's power rather than an act done wholly beyond and without its power. *Harrigan v. Gilchrist,* 121 Wis. 127, at p. 227, 99 N. W. 909.

No doubt the court had under the statute the power to admit the will to probate. From the petition it appeared that there was property within the state and claims against the estate in favor of Wisconsin creditors. But having admitted the will to probate, the authority of the court in the premises was limited to the administration of that part of the estate necessary to satisfy the claims of Wisconsin creditors. It appearing that there were no creditors, the court had no further duties to perform in the premises, and

its further act in attempting to construe the will and define the duties of the trustees was nugatory and erroneous. *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289; *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188; *Emery v. Batchelder*, 132 Mass. 452; *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244.

The duties of the trustees are to be defined by the court of domiciliary administration, and the administration and control of the estates and the trustees under the will is vested in the court of domiciliary administration. The order, therefore, attempting to construe the will as regards the duties of the trustees is erroneous.

By the Court.—The order appealed from is reversed.

UNITED SHOE REPAIRING MACHINE COMPANY, Appellant, vs. ASOUMANAKIS and another, Respondents.

June 3—June 23, 1920.

Sales: Conditional sale or lease of personal property: Transfer of title.

1. A contract between a shoe-repairing machine company and a customer which expressly reserves title to certain machinery in the company, is construed to create a bailment only and to be a lease or license of the machinery and not a conditional sale.
2. The lessee or licensee of the machinery, having no title himself, could pass none by direct sale, and none could pass by virtue of a sale under an execution against him.

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

The plaintiff corporation sought to obtain possession by writ of replevin of certain shoe-repairing machines from the defendants. Defendants claimed to be the owners thereof by virtue of purchase at a sale on July 6, 1918, upon an execution issued upon judgments obtained by the defend-

ant *Asoumanakis* and two other persons as plaintiffs against one William Schlifkin.

In November, 1917, said Schlifkin gave an order to the plaintiff for a lease to him of the shoe-repairing outfit here involved. In compliance with such order a written agreement was made dated December 5, 1917, and the outfit was delivered to Schlifkin pursuant to such agreement. The material parts of such written agreement were in substance as follows: The plaintiff leased to and licensed the said Schlifkin as licensee under any letters patent belonging to the plaintiff or under which it had the right to grant such license affecting any inventions which then or thereafter may be embodied therein or implied in the operation thereof, to use the machines designated.

The conditions which the said Schlifkin as licensee covenanted and agreed to keep and perform included, among other things: The leased machinery shall at all times remain and be the sole and exclusive property of the plaintiff, and the licensee shall have no right of property therein but only a right to use the same upon the conditions in said lease contained; the leased machinery shall be used only by the said licensee himself or by operators in his direct employ and only on the premises then occupied by him in Prairie du Chien, said state of Wisconsin. The leased machinery shall not be transferred or delivered or sublet to any other person or corporation, and neither the lease nor the license hereby granted can be assigned by the licensee by his own act or by operation of law.

The said licensee was further required to keep the leased machinery in good and efficient working order and condition and not permit any one to injure or deface or remove any plate or dates, numbers, or other inscriptions then or afterwards to be impressed on or affixed to such machinery. (The testimony disclosed that there were such plates upon these machines describing them as plaintiff's property.)

The licensee shall pay all taxes and assessments which

shall be assessed upon such machinery. The licensee agreed to pay to the plaintiff upon the execution of the lease, as an initial license fee, the sum of $345 in subsequent monthly payments, and also pay to the plaintiff on the last day of each calendar month the sum of twenty-four cents for each one thousand revolutions made during the preceding calendar month by the main shaft of one of such machines so leased. That the lease and license granted in respect to such machines shall continue, unless sooner terminated by the plaintiff because of breach thereof on the part of the licensee or as otherwise therein provided, for seventeen years from the date of the lease.

Article 7 provided that it should be subject to termination by the plaintiff as follows:

(a) By the plaintiff at any time giving thirty days' notice in writing to the licensee.

(b) In case of breach or default in the observance of the conditions in said lease; or if the licensee shall become insolvent or bankrupt or makes or executes any bill of sale, deed of trust, or assignment for the benefit of creditors; or if a sale, mortgage, lease, or removal of the leased machinery be made or attempted, or if distress, execution, or attachment be levied thereon, then plaintiff shall have the right by written notice to terminate forthwith such lease.

That if upon the expiration of the full term of the agreement the plaintiff does not request the return of the leased machinery, then it shall continue to be held and used in accordance with the conditions and provisions in the agreement and the same shall be extended indefinitely as to terms, but thereafter either the plaintiff or the licensee may terminate the same by giving to the other thirty days' written notice.

The licensee agreed that upon the termination in any manner whatever of the lease the licensee should forthwith deliver such machine to the plaintiff at Beverly, Massachusetts.

That in the event of termination by the *United Company* at any time within five years from the date of such lease solely under the provision of paragraph (a) of article 7 quoted above, but not in the exercise of any other right of termination, then the plaintiff shall credit or repay to the licensee such proportionate part of the sum paid by the licensee to the plaintiff as an initial license fee upon the grant of the license as the unexpired portion of said period of five years from the date of the lease bears to the entire period of five years. Authority was given by the tenth paragraph to the plaintiff or its agents to enter upon the premises where such machine may be and take possession and remove the same.

The machinery was installed in Schlifkin's place of business at Prairie du Chien and used by him and he made payments thereunder until on or about May 19, 1918, when he abandoned the premises and does not appear to have been heard from thereafter.

May 28th the machines involved and other property of Schlifkin's were levied upon under an execution obtained by the defendants and others in actions as above stated.

Subsequent thereto representatives of the plaintiff called on the defendants and an order was given by defendant and a new lease executed of the same machines on June 19, 1918, although such respective instruments are dated in the following September.

July 6th a sale was had on the execution and ostensibly sold to one Fotos for $208, and on the same day he included these machines with other personal property in a bill of sale to defendant *Asoumanakis* for the stated price of $500. Payments were made thereafter to plaintiff by defendants, who remained in possession of these machines and on the same premises theretofore occupied by Schlifkin until March, 1919, when for then default in payment plaintiff gave notice in writing of the termination of the lease; and on April 2d this action was commenced.

A jury trial was waived, and the court found from the testimony that the instrument in question between plaintiff and William Schlifkin should be treated as a conditional sale under sec. 2317, Stats., and void for a default in filing the same in the proper office. That the execution levy on such property as being Schlifkin's was valid and the sale thereunder gave good title. That Schlifkin ostensibly appeared to be the sole owner and considered that he had purchased the property and was such sole owner. That the attaching creditors believed that Schlifkin was such sole owner of the shop equipment and a person of means. That the plaintiff in 1917 entered into the contract with Schlifkin for the purpose of selling the property to him and that Schlifkin then believed that such lease was a bill of sale; that Schlifkin was to pay $345 in monthly instalments which were designated rent, and that when said $345 was paid no further payments were expected. That plaintiff had due notice of the attachment in May, 1918, and that it was sold on execution sale without notice of any claim by plaintiff.

As conclusions of law the court found that the plaintiff was guilty of laches in the transaction and should not be permitted to assert title to the property under the lease, and that the defendant *Asoumanakis* was therefore entitled to possession of the property by virtue of his purchase at the execution sale.

From the judgment entered in accordance with such findings the plaintiff has appealed.

For the appellant there were briefs by *Munson & Curran* of Prairie du Chien and *Bottum, Bottum, Hudnall & Lecher* of Milwaukee; and the cause was argued orally by *Geo. B. Hudnall* and by *Walter Bates Farr* of Boston.

Alvin B. Peterson and *J. P. Evans,* both of Prairie du Chien, for the respondents.

ESCHWEILER, J. We have set out above at considerable length the contract between Schlifkin and the plaintiff con-

cerning the machines in question for the reason that it was the view of the trial court that such agreement was in substance a conditional sale, and, not having been recorded pursuant to the provisions of the then existing sec. 2317, Stats., was void as to subsequent purchasers from Schlifkin.

We shall not take up the different elements of the contract in detail, but an examination of the same is sufficient to show that on its face it was not a conditional sale but a lease or license merely, and that title was expressly reserved to and continuously remained in the plaintiff. It was a bailment only, and the relationship between plaintiff and Schlifkin was not that of vendor and vendee. There is no testimony to impeach the transaction between plaintiff and Schlifkin, he not being a witness, or to contradict the express terms of the writing. It was such a valid agreement as the parties might make and conveyed no title to the personal property involved to Schlifkin. 6 Corp. Jur. 1086; *McKay v. Mace,* 23 Fed. 76; *Baker v. Priebe,* 59 Neb. 597, 81 N. W. 609; *Singer M. Co. v. D. Wolff & Co.* 70 N. J. Law, 127, 56 Atl. 147.

Having no title himself, none could pass either by sale directly from him or by virtue of the sale in July under the execution. *Monitor M. Co. v. Jones,* 96 Wis. 619, 72 N. W. 44; *Ford M. Co. v. Maeder,* 171 Wis. 263, 177 N. W. 39; *Carney v. Emmons,* 9 Wis. 114, 116; 17 Cyc. 1299; 10 Ruling Case Law, 1324; *Buxton v. Pennsylvania L. Co.* 221 Fed. 718, 721; *Mitchell v. Hawley,* 83 U. S. (16 Wall.) 544, 550.

There is no evidence here which would warrant a finding of any fraud by Schlifkin in the nature of pretended ownership of said articles to secure credit, much less anything akin to fraud participated in by plaintiff which prevents it asserting ownership.

Considerable reliance seems to have been placed by the trial court upon a conversation between one of the plaintiff's representatives and the defendants and their attorney

some months after the execution sale in July, 1918, and a short time before the commencement of this action, in which it is claimed that such representative stated that if the balance, then amounting to a considerable sum, of the initial license payment under the agreement with Schlifkin would be paid, the defendants would then own the machines. There is, however, no showing that such representative had any authority to make such a representation or to vary the terms of either the lease which had been executed between plaintiff and Schlifkin and subsequently canceled, or the subsequent lease between plaintiff and the defendants, made prior to the execution sale. In any event the payment of such balance was not made and the entire conversation is therefore immaterial.

This view of the case makes it unnecessary to consider the other questions discussed on this appeal. It follows therefrom that under the testimony in this case the plaintiff was entitled to the possession of the personal property involved.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff.

KUCHERA, Appellant, vs. KUCHERA, Respondent.

June 3—June 23, 1920.

Reformation of instruments: Degree of proof required: Definiteness: Appeal: Weight to be given findings of trial court.

1. Where there is a sharp conflict in the evidence, the findings of the trial judge who saw the witnesses cannot be disturbed on appeal if there is nothing inherently improbable in the existence of the facts found.
2. A deed conveying property to the grantor's son in consideration of a money payment and a promise to support the grantor for life will not be reformed so as to require the building of a house for the grantor and his wife, where the evidence as to the oral agreement was weak and unsatisfactory and did not specify the kind of house to be built.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action in equity to reform a deed to forty-five acres of land given June 27, 1917, by plaintiff to his son Edward and his wife in consideration of an annual payment of $55 and the support for life of plaintiff and his wife. A like deed to eighty acres was given to his older son, James, the consideration for which, expressed in a contemporaneous written agreement, was that James should support plaintiff and his wife during their natural life and pay $3,000 to plaintiff on January 1, 1925, without interest. It is also sought to recover in the action some personal property, including four cows and a team of horses.

In November, 1918, Edward died, and this action is brought against his widow.

Testimony was given upon the trial in behalf of plaintiff that Edward was to furnish material and build a house for plaintiff and his wife. Some of this testimony shows clearly that James was also to assist in building the house. Plaintiff and his wife have always lived in a home located upon the eighty acres deeded to James. As to the character of the house to be built, the evidence does not disclose any more definitely than that it was to be suitable for plaintiff and his wife. On the part of the defendant the agreement to build a house was denied. As to the issue made by the evidence the court found:

(1) "That up to the time of his death the said Edward Kuchera had made his annual payment of $55 as expressed in said deed of convevance to said plaintiff and had in all things fully performed his part of the contract by him to be performed.

(2) "I find that the written contract and deeds made and executed as aforesaid on the 27th day of June, 1917, between the parties express the terms of the agreement between the parties concerning the disposition of said real estate.

(3) "Concerning the personal property in question, I

find that the same belonged to and was the property of Edward Kuchera at the time of his death and that the plaintiff, *Joseph Kuchera,* has no interest or title thereto and is not entitled to possession thereof."

From a judgment dismissing the action upon the merits, with costs, the plaintiff appealed.

The cause was submitted for the appellant on the brief of *J. Henry Bennett* of Viroqua, and for the respondent on that of *C. W. Graves* of Viroqua.

VINJE, J. It would profit neither the parties to the action nor the legal profession to set out and discuss the evidence that resulted in the findings made by the trial court. There was a sharp conflict in the evidence, and, as to the title to the personal property, it would support a finding for plaintiff. But the trial court saw the witnesses, and his conclusion as to their veracity cannot be disturbed upon appeal since there is nothing inherently improbable in the existence of the facts found.

The case presents no basis for a reformation of the deed so as to call for the building of a house, first, because the evidence is too weak and unsatisfactory to sustain reformation, and second, it is too indefinite because it fails to disclose what kind of a house should be built, either as to kind of material, size, number of rooms, cost, or any other fact that would render specific performance possible. Evidence to sustain a reformation must be clear and satisfactory. *Govier v. Brechler,* 159 Wis. 157 (149 N. W. 740), and cases cited on page 164. Taking the evidence given by plaintiff as true, the court would have to make essential parts of the contract between them if it attempted to declare what kind of a house should be built. Under such circumstances the court properly refused reformation.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). The plaintiff in this case, an illiterate person advanced in years, conveyed by deed his

entire real estate, all on the same day, to his two sons and their respective wives; an eighty-acre farm to one son, Wenzel, with a written agreement that such son was "to furnish all goods and wares and material necessary for support of parties of the first part [being the plaintiff and his wife] during their lifetime, pay all necessary doctor bills and funeral expenses in case of death, and also to pay $3,000 January 1, 1925, without interest;" a forty-five-acre tract to the son Edward, since deceased, and his wife, the present respondent, as joint tenants. The latter conveyance was by the statutory form of warranty deed, and the consideration from the grantees for such conveyance was expressed in the following words: "For the sum of $55 to be paid annually during the remainder of my life." One payment of $55 was made as of June, 1918. Edward Kuchera, the son, died December 14, 1918, without issue.

The trial court made a memorandum decision concerning this case, in which he quite fully and carefully reviewed the testimony and stated as his conclusion that there was an agreement, in addition to what the writing purported to require, on the part of the son Edward, by his agreeing to furnish material for a house to be built upon the northeast corner of the forty-five-acre tract. The house was to be built by the plaintiff father and the other son at such time as the father might require. The father at the time and for twenty-five years prior thereto had lived upon the eighty-acre homestead conveyed to the other son, upon which there were two houses. The court further stated his conclusion to be "that the agreement should be reformed to the extent of requiring the widow, *Mabel Kuchera,* to furnish the material necessary for the erection of a suitable house in the northwest corner of the forty-five-acre tract, which shall be erected from such material by the plaintiff and his son Wenzel, and which plaintiff and his wife shall be entitled to use and occupy, together with one acre of ground in connection therewith, during the term of their

natural lives." He further states that the evidence leaves the character of the house very indefinite, but that he is of the opinion that a story-and-a-half house 16 by 24 will be ample for their needs, and that thirty days' notice should be given to the defendant, *Mabel,* for the furnishing of such material in order to enable her to save a forfeiture of her estate in the land,—the house to revert to her upon the death of the plaintiff and his wife. Subsequently the court, by letter to respective counsel, stated that on further examination he is convinced that the proposed reformation of the contract in reference to the furnishing of material for a house cannot be sustained, for the evidence is so indefinite that it is impossible to determine precisely what the parties intended in respect to the matter, saying further:

"The rule which our supreme court has adopted is to the effect that, in order to warrant a reformation, the evidence must be clear, satisfactory, and definite. For that reason I have come to the conclusion that the only judgment which I can render in the matter is for a dismissal of the plaintiff's action and have signed finding and judgment to that effect."

I think his findings set forth in the statement of facts herein must be construed in connection with his foregoing decision.

To my mind it is very clear, from what was so clearly said by the trial court in his memorandum decision and in his letter subsequent thereto, that relief was denied plaintiff only because it was impossible to determine from the evidence the necessary details upon which a judgment could be framed defining what particular kind of a house was to be built. It is equally clear from what was said by the trial court in that regard and from the record that the consideration agreed to be given by the son Edward for the conveyance of the forty-five-acre tract to him and his wife was much more than the mere agreement to pay the meager sum of $55 a year during the lifetime of the plaintiff. The prayer of the complaint was not confined to a demand for

reformation of the deed but prayed for other relief as well, and even if it had not so prayed the facts presented impress me as crying out loudly for the interposition of the broad powers of a court of equity to grant some suitable and adequate relief measuring up to the evident equitable need.

While a court of equity might properly hesitate, as did the trial court, in attempting to put in concrete shape what was left so indefinite by the testimony of the parties, namely, the necessary details for a mandate necessary to carry out the agreement to construct a house, yet a court of equity should not for that reason send the plaintiff homeless and acreless out of court.

The son Edward is no longer here to carry out the agreement on his part and there is no evidence to show that he repudiated it in any way during his lifetime. His widow, a stranger to the blood of the grantor, could be easily and fairly placed in her original position as to this transaction by the repayment to her of the $55 which had been paid by her husband during his lifetime. She, not Edward, has repudiated the substantial part of the agreement upon which the plaintiff parted with his title to the farm, and, having so repudiated it, equity should act and restore the present parties to the condition they were in prior to the making of the contract. To now permit such a stranger to so profit by such repudiation appeals to me to be working a cruel injustice.

The extent to which this court has heretofore gone with reference to the exercise of its equitable powers in such situations where contracts of this nature cannot be carried out is well exemplified in the cases of *Danielson v. Danielson,* 165 Wis. 171, 161 N. W. 787, and *Scholl v. Muscovitz,* 170 Wis. 97, 174 N. W. 463.

VILLAGE OF WESTBY, Respondent, vs. BEKKEDAL and others, Appellants.

June 3—June 23, 1920.

Partnership: Joint adventure: Residence of partnership: Taxation of income: Ascertainment of profits: Partnership operating in two states: Allocation of income: Estoppel to question amount of tax: Failure to appear before board of review: Return made by agent: Personal property taxes as offset: Penalty: Interest.

1. An agreement whereby a partnership the members of which resided in Wisconsin was to advance forty per cent. of the necessary money and was to have the exclusive control of purchasing, storing, handling, and shipping tobacco, and a partnership the members of which resided in New York was to furnish sixty per cent. of the money and have exclusive control of the sale and disposition of the tobacco, the two firms sharing the profits and losses, creates a partnership under the uniform partnership act (secs. 1724*m*—1 to 1724*m*—38, Stats.) and not a joint adventure.
2. The word "income," as used in sub. 3, sec. 1087*m*—2, Stats., is to be given the same meaning it has in every-day language, and is a profit or gain derived from capital or labor, or both combined; and in determining the income of a partnership it is necessary to deduct from the gross proceeds of sales the expenses, cost of purchasing, storing, handling, and shipping.
3. A partnership has no entity distinct and apart from the persons who compose it.
4. Where it was provided by the agreement between the partnerships that all sales were to be made out of the state, the partnership "resided" equally within the state of New York and the state of Wisconsin within the meaning of sec. 1087*m*—22, Stats., relating to the situs of income for taxation purposes.
5. Under the agreement the income belonging to the Wisconsin partnership was taxable in this state under sub. 3, sec. 1087*m*—2, Stats., and the portion of the income apportioned to the New York firm was income derived partly from property and business within the state of Wisconsin and partly from business transacted without the state, and should have been allocated.
6. The Wisconsin partnership was the agent of the New York partnership in making a return for purposes of the income tax, and the New York firm is estopped to dispute the assess-

ment where it failed to appear before the board of review, under sec. 1087*m*—18, Stats., although the New York firm was not notified of the return or that an assessment was made.

7. Under sec. 1087*m*—26, defendants in an action to recover income tax are entitled to offset personal property taxes and have the same deducted from the amount of income tax found due.
8. The penalty prescribed by sec. 1090 in the event that a tax is not paid within the time prescribed becomes a part of the tax and payable with it.
9. Under sec. 1126, such income tax bore interest at the rate of twelve per cent. per annum from the 1st day of January until the entry of judgment in an action to recover the same.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Modified and affirmed.*

M. H. Bekkedal & Son are a partnership located at Westby, Wisconsin, engaged in the business of buying, sorting, handling, and shipping of tobacco. E. Rosenwald & Brother are a partnership having its principal office and place of business in the city of New York, and engaged in the selling, handling, and merchandising of tobacco. On March 6, 1917, the two partnerships entered into a contract by the terms of which the *Bekkedals* (party of the second part) were to buy tobacco of 1916 crop, raised in the state of Wisconsin, in joint account with the party of the first part (the *Rosenwalds*), and attend to the packing and handling of the same. The *Rosenwalds* agreed to attend to the marketing of the tobacco so purchased and packed, and apply all the net proceeds of any sales made to the credit of the joint account, as kept on their books.

The contract contained a provision as to the manner in which advances were to be made by each of the parties to the contract, the *Rosenwalds* to advance sixty per cent. and the *Bekkedals* forty per cent. The *Rosenwalds* agreed to use every effort to dispose of the tobacco to the best advantage, and the *Bekkedals* agreed to give their sole attention to the buying, packing, and handling of the joint-account

holding. It was agreed that the net profits or net losses should be shared, sixty per cent. to the *Rosenwalds* and forty per cent. to the *Bekkedals*. The contract required that the name of *E. Rosenwald & Brother* should show distinctly on each warehouse used for the packing or handling of joint-account tobacco. While the contract covered the crop of 1916, it was to continue unless terminated by three months' notice. It appeared without dispute that under the contract a large amount of tobacco was bought and stored, packed and prepared for shipment, and sold under the contract, and the net proceeds for the year 1917 was the sum of $345,296.11; that all of the business transactions relating to the sale and marketing of said tobacco were conducted, managed, and directed by the *Rosenwalds,* including the procuring of purchasers, collection of purchase price, the shipping, invoicing, insuring, and the fixing of prices, without participation therein by the *Bekkedals,* and that such sales were made to purchasers without the state of Wisconsin; that, when sales were made, the tobacco was loaded on board cars by the *Bekkedals* and shipped to purchasers directly from *Westby* and other warehouses located in Wisconsin, upon order of the *Rosenwalds;* that all the proceeds of the sales were collected by the *Rosenwalds* at their office without the state of Wisconsin, and that at the time the proceeds of such sales were received no part of the tobacco sold was located within the state of Wisconsin.

It further appeared that *M. H. Bekkedal,* on April 30, 1918, at the request of the income tax assessor, and without the actual knowledge or express authority of the *Rosenwalds,* made, signed, and filed, as was required by law, a joint return with the income tax assessor, and that upon the return so made there was assessed jointly against the partnerships an income tax for the year 1917 of $20,352.76, which amount was duly certified and placed upon the tax roll of the plaintiff village for the year 1918. It further appears that on May 1, 1918, there was assessed and levied

against the personal property belonging to the joint accountants a tax amounting to $8,657.39, which taxes were afterward paid; that out of the amount of taxes so paid the *Rosenwalds* claim the right to offset $5,194.44 and the *Bekkedals* $3,462.95 against any tax which the court might find and determine in this action is justly due from the defendants; that the *Rosenwalds* had no information as to the assessment of the taxes upon the return made and filed, before the same had been certified by the county clerk of Vernon county to the clerk of the village of *Westby*.

The case was tried by the court, and the court found upon the facts as stated that the contract between the two partnerships amounted to a partnership contract creating a partnership; that the income derived from the business of the joint account was income derived from property and business transacted within the state of Wisconsin, and that the defendants made no appearance before the county board of review for income tax assessment; allowed an offset of $8,657.29 personal property tax. The plaintiff had judgment for the remainder; from which judgment the defendants appeal.

C. W. Graves of Viroqua and *R. B. Graves* of Sparta, for the appellants.

For the respondent there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *C. J. Smith,* district attorney of Vernon county, and oral argument by *Mr. Brossard.*

ROSENBERRY, J. The principal contention of the defendants here is that the court erred in holding that the income in question was derived from property located or business transacted within the state of Wisconsin, within the meaning of the income tax act. It is further contended that the court erred in holding that the contract of March 6, 1917, entered into by the partnerships, created a partnership.

There was a motion on the part of the plaintiff under the

provisions of sec. 3049*a*, Stats., to review the judgment on the ground that the trial court was in error in denying two per cent. penalty and interest at the rate of twelve per cent. per annum from January 1, 1919, to the date of the entry of judgment, together with taxable costs.

On the part of the defendants it is argued that the relationship between the defendant partnerships was that of a joint adventure rather than a partnership, and this argument is placed upon the ground that although there is admittedly a sharing of profits and losses, and community of interest, the agreement does not contemplate that each of the parties shall be the agent for the other. *Jackson v. Hooper,* 76 N. J. Eq. 185, 74 Atl. 130; *Cox v. Hickman,* 8 H. L. Cas. 268. This argument is based upon that provision of the contract which provides that the purchasing, storing, handling, and shipping of the tobacco shall be exclusively within the control of the *Bekkedals,* and that the sale and disposition of the tobacco shall be exclusively in the hands of the *Rosenwalds.* It would seem to require no argument to show that, considering the business as a whole, the *Bekkedals* were to act as agents for the *Rosenwalds* in the purchasing, storing, handling, and shipping, because the *Rosenwalds* had a sixty per cent. interest in the tobacco when purchased, and that as to the sales the *Rosenwalds* were to act as agents of the *Bekkedals,* the *Bekkedals* having a forty per cent. interest in the proceeds of the sales when made. We think the contract in question created a partnership as defined by the uniform partnership act (ch. 81*m,* Stats.).

Upon the other branch of the case it is argued that, because the sales are made and the proceeds collected entirely without the state of Wisconsin, all of the income of the partnership is derived from business transacted without the state of Wisconsin, and therefore not taxable under the provisions of sub. 3, sec. 1087*m*—2, which provides that an income tax "shall be assessed, levied and collected upon all

income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state." By the provisions of the income tax law the term *income* includes "all profits derived from the transaction of business or from the sale of real estate or other capital assets" (sub. 2 (d), sec. 1087*m*—2). This statutory definition gives to the word *income* its ordinary meaning as used in every-day language, that is, that income is a profit or gain derived from capital or labor or from both combined. *State ex rel. Bundy v. Nygaard,* 163 Wis. 307, 158 N. W. 87. Manifestly the total proceeds of the sales of the tobacco covered by the contract in question were not profits, hence not income. In order to determine what the profits under the contract were, it was necessary to deduct from the gross proceeds of the sales made by the *Rosenwalds* their expenses, and cost of purchasing, storing, handling, and shipping the tobacco incurred by the *Bekkedals,* and until that was done no determination could be made as to what was and what was not income, whether that term be used in the statutory sense or in its ordinary business significance. The sales made by the *Rosenwalds* were one factor, and the purchasing, etc., by the *Bekkedals* were the other factor, the combination of which produced the profit. Hence, to argue that, because the sales were entirely without the state, all of the income was derived from business without the state, when it is conceded that a large part of the business was transacted within the state, is to argue from a false premise. The partnership had an income, at least a part of which was derived from property located or business transacted within the state. The question presented is, Where and to whom was such income properly assessable? By sec. 1087*m*—22, Stats., the situs of income for purposes of taxation is that of its recipient if the recipient be a resident, and, if the recipient be a nonresident, then the tax shall be assessed,

provisions of sec. 3049*a*, Stats., to review the judgment on the ground that the trial court was in error in denying two per cent. penalty and interest at the rate of twelve per cent. per annum from January 1, 1919, to the date of the entry of judgment, together with taxable costs.

On the part of the defendants it is argued that the relationship between the defendant partnerships was that of a joint adventure rather than a partnership, and this argument is placed upon the ground that although there is admittedly a sharing of profits and losses, and community of interest, the agreement does not contemplate that each of the parties shall be the agent for the other. *Jackson v. Hooper,* 76 N. J. Eq. 185, 74 Atl. 130; *Cox v. Hickman,* 8 H. L. Cas. 268. This argument is based upon that provision of the contract which provides that the purchasing, storing, handling, and shipping of the tobacco shall be exclusively within the control of the *Bekkedals,* and that the sale and disposition of the tobacco shall be exclusively in the hands of the *Rosenwalds.* It would seem to require no argument to show that, considering the business as a whole, the *Bekkedals* were to act as agents for the *Rosenwalds* in the purchasing, storing, handling, and shipping, because the *Rosenwalds* had a sixty per cent. interest in the tobacco when purchased, and that as to the sales the *Rosenwalds* were to act as agents of the *Bekkedals,* the *Bekkedals* having a forty per cent. interest in the proceeds of the sales when made. We think the contract in question created a partnership as defined by the uniform partnership act (ch. 81*m,* Stats.).

Upon the other branch of the case it is argued that, because the sales are made and the proceeds collected entirely without the state of Wisconsin, all of the income of the partnership is derived from business transacted without the state of Wisconsin, and therefore not taxable under the provisions of sub. 3, sec. 1087*m*—2, which provides that an income tax "shall be assessed, levied and collected upon all

income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state." By the provisions of the income tax law the term *income* includes "all profits derived from the transaction of business or from the sale of real estate or other capital assets" (sub. 2 (d), sec. 1087*m*—2). This statutory definition gives to the word *income* its ordinary meaning as used in every-day language, that is, that income is a profit or gain derived from capital or labor or from both combined. *State ex rel. Bundy v. Nygaard,* 163 Wis. 307, 158 N. W. 87. Manifestly the total proceeds of the sales of the tobacco covered by the contract in question were not profits, hence not income. In order to determine what the profits under the contract were, it was necessary to deduct from the gross proceeds of the sales made by the *Rosenwalds* their expenses, and cost of purchasing, storing, handling, and shipping the tobacco incurred by the *Bekkedals,* and until that was done no determination could be made as to what was and what was not income, whether that term be used in the statutory sense or in its ordinary business significance. The sales made by the *Rosenwalds* were one factor, and the purchasing, etc., by the *Bekkedals* were the other factor, the combination of which produced the profit. Hence, to argue that, because the sales were entirely without the state, all of the income was derived from business without the state, when it is conceded that a large part of the business was transacted within the state, is to argue from a false premise. The partnership had an income, at least a part of which was derived from property located or business transacted within the state. The question presented is, Where and to whom was such income properly assessable? By sec. 1087*m*—22, Stats., the situs of income for purposes of taxation is that of its recipient if the recipient be a resident, and, if the recipient be a nonresident, then the tax shall be assessed,

levied, and collected in the district from which the income is derived. Where does the partnership created by the contract of March 6, 1917, reside? It is undisputed that the members of the *Bekkedal* firm reside in the state of Wisconsin, in the village of *Westby,* and that the members of the *Rosenwald* firm reside in the state of New York, and that the partnership business was transacted partly in the state of Wisconsin.

There are cases which hold that a partnership is a legal entity distinct and independent of the persons who compose it. 20 Ruling Case Law, p. 804, § 6, and cases cited. It is held in *Hughes v. Gross,* 166 Mass. 61, 43 N. E. 1031, that a partnership is not an entity, and that such is the rule of the common law. So far as we are able to discover, the question of whether or not a partnership is a legal entity distinct and separate from the persons who compose it has never been considered by this court. In *O'Gorman v. Fink,* 57 Wis. 649, 15 N. W. 771, it was held that where partnership property is seized it is sufficient to inform the officers that exemption is claimed by all of the partners and ask that the partners be permitted to make the selection. The holding in that case is inconsistent with the theory that a partnership has a legal entity separate and apart from the members who compose it. Under the United States bankruptcy act of 1898 (30 U. S. Stats. at Large, 544, ch. 541) a partnership is considered as a separate and distinct entity. 21 L. R. A. N. S. 960. On the other hand, under the diverse citizenship clause of the constitution of the United States a partnership is held, for the purposes of that clause, to reside in any state where one of the partners resides; that is, a suit begun in the state in which one of the partners resides cannot be removed on the ground of diverse citizenship. While the question has not been directly passed upon, the reasoning of many cases before this court is based upon the theory that a partnership has no entity distinct and apart from the persons who compose it. The partnership in ques-

tion, therefore, resided equally within the state of New York and within the state of Wisconsin.

It appears without dispute that forty per cent. of the income of the partnership belonged to the *Bekkedals.* Under the construction given to the clause "derived from business transacted and property located within the state," in *U. S. G. Co. v. Oak Creek,* 161 Wis. 211, 153 N. W. 241, it is plain that that part of the income belonging to the *Bekkedals* was taxable within this state, it being derived wholly from property located and business transacted within this state and transactions embodying, as to the *Bekkedals,* interstate commerce.

As to that portion of the income apportioned under the contract to the *Rosenwalds,* it is income derived partly from property and business within the state of Wisconsin and partly from business transacted without the state of Wisconsin, and it should therefore have been allocated. *U. S. G. Co. v. Oak Creek,* 161 Wis. 211, 153 N. W. 241. As to the *Rosenwalds,* that portion of the income belonging to them must be treated as partly earned from business transacted for them by an agent, their partner the *Bekkedals,* residing within the state of Wisconsin.

The income, so far as the transaction of business within this state is concerned, being properly assessable here, the question raised is whether or not the *Rosenwalds* are estopped to dispute the assessment by reason of their failure to appear before the board of review. Sec. 1087*m*—18, which provides that no person subject to assessment shall be allowed in any action or proceeding to question any assessment of income unless objection thereto shall first have been presented to the board of review in good faith and full disclosure made under oath of any and all income of such party liable to assessment, is in its general features the same as sub. 5, sec. 1061, of the Statutes. In *State ex rel. Foster v. Williams,* 123 Wis. 73, 100 N. W. 1052, sub. 6, sec. 1061, was construed, and it was held that a taxpayer failing to

comply with the provisions of the statute is thereby prevented from thereafter questioning the assessment. While the general policy of the statute is commended in *State ex rel. Foster v. Williams, supra,* its constitutionality has never been determined, although the matter was proposed in *Milwaukee v. Wakefield,* 134 Wis. 462, 113 N. W. 34, 115 N. W. 137, and that question is not raised here. Under the cases cited and *Bratton v. Johnson,* 76 Wis. 430, 45 N. W. 412, and *Wis. Cent. R. Co. v. Ashland Co.* 81 Wis. 1, 50 N. W. 937, we see no reason why the statute should not be applied here in accordance with its terms. The matter of its constitutionality is not raised. As to the *Bekkedals,* they themselves made the return. As to the *Rosenwalds,* the return was made by their agent, who transacted the business for them within this state, and they therefore cannot complain that they were not notified of the return or that the assessment was made in accordance with it. The defendants are therefore precluded from questioning the amount of the taxes in this proceeding.

On behalf of the state it is argued that under the provisions of sec. 1087*m*—26 the defendants are not entitled to offset personal property taxes in this suit, for the reason that the defendants have not paid the tax and are therefore not entitled to offer the tax upon the personal property as an offset. While under a strict construction of the statute it might be argued that the tax when paid in the form of a judgment is not paid to the city, town, or village, in the sense that payments are not made directly to them, we are of the opinion that the deduction of the amount of the personal property tax from the amount to be paid to the village is authorized, inasmuch as it is the intent of the statute to give to the taxpayer this right. The statute prescribes a method rather than defines a right. The penalty prescribed by the statute (sec. 1090) in the event that the tax is not paid within the time prescribed becomes a part of the tax and payable with it. *State ex rel. Portage Co. D. Dist. v.*

Newby, 169 Wis. 208, 171 N. W. 953. The trial court was therefore in error in disallowing the penalty of two per cent. amounting to $233.90. We are also of the opinion that under sec. 1126 the tax bore interest at the rate of twelve per cent. per annum from the 1st day of January, 1919, instead of six per cent. The judgment, therefore, should be modified so as to include the penalty, and the sum of $656.11 to make the interest twelve per cent.; and as so modified will be affirmed.

By the Court.—Judgment affirmed as modified.

RUSSELL, Respondent, vs. IVES, Appellant.

June 4—June 23, 1920.

Statute of frauds: Sufficiency of writing: Oral acceptance of written offer: Husband without authority contracting to sell wife's property: Liability: Vendor and purchaser: Merchantable title to be tendered before purchase money is due: Necessity of tender of purchase money when vendor gives notice that he would not perform.

1. A memorandum of sale covering a wife's real estate, made by the husband, who signed the name of the wife, is sufficient under sec. 2304, Stats., where it describes the property and states the purchase price and terms of payment.
2. An oral acceptance of a written option to sell land is valid.
3. Where a husband, without authority from his wife, contracts to sell realty belonging to her, he himself is bound by the contract.
4. Where the memorandum of sale specified that abstracts should be furnished, a merchantable title was impliedly to be tendered before the purchase money could be demanded.
5. Where a vendor notifies a purchaser that he will not perform the contract of sale, the purchaser is under no obligation to make a tender of the price.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover damages for breach of contract to sell

real estate. On the 13th day of September, 1919, the defendant, purporting to act for his wife, Grace H. Ives, the owner of the property, made the following written offer to plaintiff:

"I hereby offer you as follows: I will transfer to you, on or before October 3, 1919, the three lots on the northeast corner of Fifth and King streets, now in the name of Grace H. Ives, for $20,000 in cash and a mortgage back on the property below for $—— for —— years at —— % for the property described, to wit: ——, situated in the city of La Crosse, state of Wisconsin. Possession to be given ——. Abstracts to be furnished by the seller of the real estate conveyed showing merchantable title therein. This offer to hold good for —— days from date without revocation by me.

"Dated at La Crosse this 13th day of September, 1919.

"GRACE H. IVES. [Seal]

"This offer accepted this 13th day of September, 1919.

"Per THOMAS S. IVES."

Plaintiff claims that before September 18, 1919, he orally accepted the offer. On that date the defendant served written notice of cancellation of the offer. The jury found (1) the offer to sell the property in question as embodied in the written memorandum bearing date September 13, 1919, was accepted by the plaintiff prior to September 18, 1919; (2) the fair, reasonable market value of the property in question on the 18th day of September, 1919, was $22,500. It was conceded that defendant had no authority from his wife to make the offer and a nonsuit as to her was entered. Plaintiff secured a judgment for $2,500 and costs against the defendant *Thomas S. Ives,* and he appealed.

For the appellant there was a brief by *George H. Gordon, Law & Gordon* of La Crosse, and oral argument by *George H. Gordon.*

For the respondent there was a brief by *Baldwin & Bosshard* of La Crosse, and oral argument by *Mr. C. L. Baldwin.*

VINJE, J. The memorandum of sale was signed by the party by whom the sale was to be made. That is sufficient under our statute. Sec. 2304, Stats. 1917, provides that

"Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands shall be void unless the contract or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made or by his lawfully authorized agent."

It described the property, stated the purchase price, and the terms of payment, namely, cash. So it complied with the statute in every respect.

But it is contended by defendant, first, that there is no evidence to sustain the finding that plaintiff orally accepted the offer, and second, that an oral acceptance of a written offer to sell lands is void; that the acceptance must be in writing also. As to the first claim the record shows evidence sustaining the finding. Plaintiff testifies that before the 18th of September he told defendant that he would take the lots; that he was there to do so, and the defendant said, "All right." The memorandum was signed Saturday and this conversation took place the following Tuesday morning after they had measured the property.

As to the second contention, the authorities are almost unanimous in holding that an oral acceptance of a written option to sell land is valid. See 25 Ruling Case Law, 674, and long list of cases there cited. The case of *Wardell v. Williams,* 62 Mich. 50, 28 N. W. 796, is cited to us as holding a contrary doctrine. An examination of the case will show that the court in that case held the written memorandum incomplete, and that the precise question here presented was reserved. The court said:

"It is not necessary for us to decide in this case whether a verbal acceptance would be binding when there was nothing to be done by the purchaser except the payment of the purchase money, for the reason that in this case something more was required." Page 62.

See, also, *Cheney v. Cook,* 7 Wis. 413, and *Lowber v. Connit,* 36 Wis. 176.

Since the defendant had no authority from his wife to sell the lots he bound himself by the contract he made. *Wis. Farm Co. v. Watson,* 160 Wis. 638, 152 N. W. 449.

No tender of money before September 18th was necessary, for the memorandum specified that abstracts should be furnished and a merchantable title was impliedly to be tendered before the purchase money could be demanded. After plaintiff was notified on the 18th that defendant would not perform, he was under no obligation to make a tender. *Potter v. Taggart,* 54 Wis. 395, 11 N. W. 678; *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887; *Inglis v. Fohey,* 136 Wis. 28, 116 N. W. 857.

By the Court.—Judgment affirmed.

STATE EX REL. LOTZ and others, Respondents, vs. HULL, Secretary of State, Appellant.

June 4—June 23, 1920.

States: Fees of state board of medical examiners: Contradictory statutes: Attempted repeal of non-existent statute: Effect.

Sub. 7, sec. 1436, Stats. 1915, fixing the maximum compensation of members of the state board of medical examiners at $10 per day, is not affected or repealed by sec. 20.44, Stats. 1917, fixing such maximum at $5, passed by the legislature to re-enact sub. 47, sec. 170, ch. 12, Stats. 1913, under the mistaken assumption that such law was in force.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The petitioners are members of the Wisconsin State Board of Medical Examiners. They fixed their compensation as such at the sum of $30 each for three days' attendance at a regular meeting of said board in June, 1919, under the claimed authority of sub. 7, sec. 1436, Stats., and

presented and filed with the defendant secretary of state claims or vouchers for such three days' service at the rate of $10 per day and demanded his audit of the same, upon which audit payment might be made to them respectively. The secretary of state refused to audit the claims except upon a basis of $5 per day. Petitioners then obtained an alternative writ of *mandamus* issued from the circuit court for Dane county requiring said defendant to so audit such claim at the rate of $10 per day. Defendant moved to quash such alternative writ.

From an order refusing to so quash and directing a peremptory writ of *mandamus* as prayed for by the relators defendant has appealed.

For the appellant there was a brief by the *Attorney General* and *M. B. Olbrich,* deputy attorney general, and oral argument by *Mr. Olbrich.*

A. C. Umbreit of Milwaukee, for the respondents.

ESCHWEILER, J. The only question involved in this appeal is as to whether the maximum *per diem* compensation to the petitioners as members of the Board of Medical Examiners of this state shall be the sum of $5 or $10.

In June, 1919, at the time the petitioners fixed their compensation at $10 per day, the following two provisions of law stood upon the statutes of this state:

"Section 1436. The Wisconsin state board of medical examiners shall have the power and it shall be its duty: . . .

"7. To fix the compensation to be paid the members of said board, such compensation not to exceed the *sum of ten dollars* for each day actually spent in attending to the business of the board and the actual and necessary expenses of such members. All compensation and legitimate and necessary expenses incurred by the members, employees and the attorney of the board shall be paid from the fees and moneys received by said board and paid into the state treasury as an appropriation for said board."

Also:

"Section 20.44. *Board of medical examiners.* There is appropriated from the general fund to the state board of medical examiners, as follows:

"(1) *General.* All moneys collected or received by each and every person for or in behalf of said board shall be paid within one week after receipt into the general fund, and are appropriated therefrom for the execution of the general functions of the board. Of this there is allotted:

"(a) To each member of the board such compensation as shall be determined by the board, *not exceeding five dollars for each day* actually spent in attending to the business of the board."

The first of the above quoted sections came into the form as given by ch. 438, Laws 1915, and was placed in ch. 58, Stats. 1915, entitled "Medical Societies;" the second appeared as the result of ch. 14, Laws 1917, and was inserted in ch. 20, Stats. 1917, entitled "Appropriations and Salaries." Manifestly but one of such provisions fixing the maximum compensation can be the present law. The legislature when it closed its labors in 1917 left standing in the published laws of that year the two as above quoted, and the trial court held, and we think rightly, that the legislative intent to be spelled out from the somewhat perplexing situation presented must be that the first of the above quoted provisions, or that making the maximum compensation $10 a day, is the present law.

In 1911 the only statutory provision for compensation for such members fixed it at a maximum of $5 per day by sec. 1435*c* in ch. 58, "Of Medical Societies."

In 1913 a like amount was fixed for such salary by enacting sub. 47, sec. 170, inserted in ch. 12, "Salaries of Officers."

Ch. 438, Laws 1915, expressly repealed the above mentioned sec. 1435*c*, and by sec. 3 of said chapter provided: "All acts or parts of acts in conflict with the provisions of this act are hereby repealed." The same chapter 438

created sec. 1436, including sub. 7 as quoted at the commencement of this opinion, and there has been no express repeal of such statute since then.

No serious contention is made nor could one well be made but that the repealing clauses in said ch. 438, Laws 1915, together with the enacting part thereof so creating sub. 7 of the new sec. 1436 above quoted, repealed and wiped off the statute books both of the two separate provisions theretofore existing fixing the maximum compensation at $5 per day as embodied in the former sec. 1436*c* and sub. 47 of sec. 170.

At the close of the session of 1915, therefore, there was but one provision in force regulating the amount of compensation, and that was the new sub. 7, sec. 1436, Stats., *supra,* fixing the maximum at $10 per day.

The revisor of the statutes presented to the legislature of 1917 for its consideration a bill which subsequently became ch. 14 of the Laws of 1917, and headed as follows:

"AN ACT to renumber chapter 20 of the statutes to be chapter 21 thereof, and to renumber sections 20.01 to 20.90 of said chapter respectively to be sections 21.01 to 21.90 respectively, and to consolidate and renumber chapters 12*c* and 12*m* of the statutes, to be chapter 20 thereof; to consolidate, renumber and revise or amend all the sections and subsections of said chapters 12*c* and 12*m*, and other sections of the statutes and session laws herein specifically referred to, all relating to appropriations and salaries."

This act expressly included as parts thereof, among other things, a long table of contents as to the various departments of government and the previous sections of the statutes, and also a table of new-numbered sections affected by the act itself.

No reference or express provision is made, however, in such ch. 14 to sub. 7, sec. 1436, Stats., *supra.*

The same chapter, however, did, in form at least, consider the above mentioned sub. 47, sec. 170, as being still in

force and in existence, as is quite apparent from the very language of sec. 77 of said ch. 14, which starts as follows: "*Subsection 47 of section 170;* and sections 172—25 and 172—94 of the statutes are consolidated to be section 20.44, and revised to read;" and then follows the new sec. 20.44 quoted above.

There are two other significant features in connection with this ch. 14, Laws 1917: first, the revisor's note accompanying the bill so presented by him says:

"This revision carries forward the undertaking, inaugurated in the legislative session of 1911 and continued in the sessions of 1913 and 1915, to systematize and centralize in a single chapter all statutory provisions setting aside or appropriating state moneys for specified purposes. The bill, it is believed, consolidates and presents *all such statutes existing and in force* at the beginning of the present session."

Evidently by this language indicating the purpose in the presentation of this law at least, and especially by the language above italicised, to be that such statutes as were then to be merely renumbered or consolidated were considered *then* existing statutes. This, as we have seen, so far as sub. (a) of sec. 20.44, which was the exact language of repealed sub. 47 of sec. 170, is concerned, was a mistake and contrary to the fact.

There is therefore to be found no evidence of any express intent to directly or indirectly repeal the then existing sub. 7, sec. 1436, and plain and convincing proof that the legislature indulged in the mistaken assumption that sub. 47, sec. 170, Stats., *supra,* was still in existence.

Of the two horns of the dilemma here presented to us we think it the more reasonable course to hold to the one grasped by the trial court and decide that the attempted reenactment by ch. 14, Laws 1917, of former sub. 47, sec. 170, as an existent law, when as a matter of fact there was none such, was an error evident upon the face of the legislative records and which must be disregarded and held not con-

trolling as against the express provisions of sub. 7, sec. 1436, Stats., *supra,* to repeal which we can find no sufficient indication of legislative intent.

This disposition of the matter is well within the former ruling of this court in the case of *Svennes v. West Salem,* 114 Wis. 650, 653, 91 N. W. 121, and we need look no further for authorities.

Other objections have been raised and argued by defendant upon this appeal, but we deem it best to dispose of the matter upon the one point decided herein.

By the Court.—Order affirmed.

STATE EX REL. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent, vs. BRAMAN and another, Appellants.

June 5—June 23, 1920.

Street railways: Construction of franchise: Franchise to lay tracks authorizes cutting sidewalk lines: Extension of city limits: Effect on extension of line: Street not wholly within city: Sidetracks and switches.

1. A street railway franchise ordinance authorizing and requiring the extension of lines when the city limits are extended, and providing that the franchise should thereafter apply to the "operation" of those lines, permits the construction of turnouts, sidetracks, and switches along the extended lines.
2. Where such a franchise also authorized the construction of either single or double tracks along the specified streets, it authorized the construction of a single track along the part of the street controlled by the city when the corporate limits on one side only of the street were extended.
3. While in some cases ordinances granting franchises to utilities are to be strictly construed, they are not to be construed so strictly as to defeat the purpose for which the grant is made.
4. A street railway franchise to lay tracks in the street authorizes the cutting of the sidewalk lines, though they are not strictly in the streets, if that is reasonably necessary to proper construction of the tracks.

5. Where a franchise ordinance authorized the construction of turnouts, sidetracks, and switches, the consent of the common council to the plans for such construction is not necessary in the absence of a requirement for such consent.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

Mandamus. By order dated October 30, 1919, the railroad commission of Wisconsin ordered the relator to procure and place in service on its city and suburban system 100 additional cars on or before November 1, 1920. In order to place the cars in service it is necessary that incidental facilities for the housing, inspection, maintenance, and repair of cars be provided. For that purpose the relator maintains a station at the corner of National avenue and Twenty-second avenue, sometimes described as Layton boulevard, in the city of Milwaukee. This storage place or car barn is about 600 feet in length and 200 feet in width, and at the south end abuts on National avenue. In order to provide additional facilities for the cars ordered, it was necessary for the relator to connect its premises at the north end with Layton boulevard (see Exhibit B, p. 133).

The relator also proposed to connect its line on Hopkins road with its track on Twenty-seventh street, in the manner shown on defendants' Exhibit A (see p. 134). By secs. 1193 and 1194 of the Milwaukee Code, before the relator could do the work contemplated it was required to apply to the commissioner of public works for permit to disturb the pavement. Sec. 1194 provides:

"Upon application and payment of the deposit for which provision is hereinafter made, the commissioner of public works may in his discretion issue a permit to excavate or disturb the surface of any street, alley or public place between curb lines. . . ."

Upon the advice of the city attorney, the defendant, the acting commissioner of public works, refused to issue the permit.

The ground upon which the city attorney advised the defendant to deny the permit is that the relator has no franchise which authorizes it to lay the proposed tracks, and no other reason is assigned.

The permit being refused, the relator commenced this action in the circuit court for Milwaukee county to compel the defendant to issue the required permit. The defendant

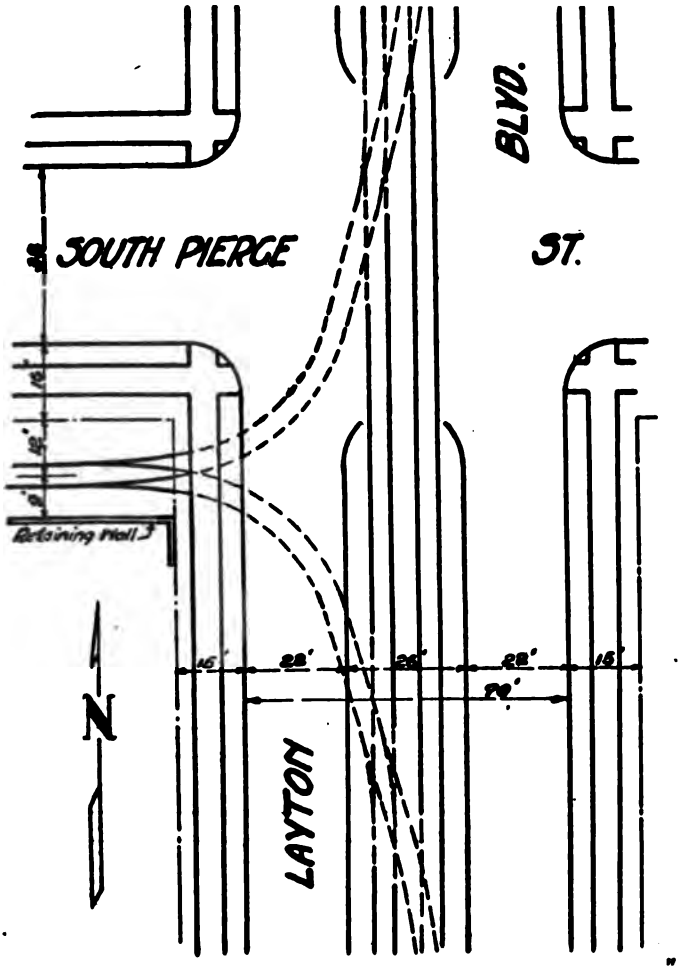

Exhibit "B"

made a return to the alternative writ, by way of admissions and denials, and upon the issues so joined there was a trial before the court, the jury being waived. Upon the trial the defendant offered no evidence and filed no briefs. The

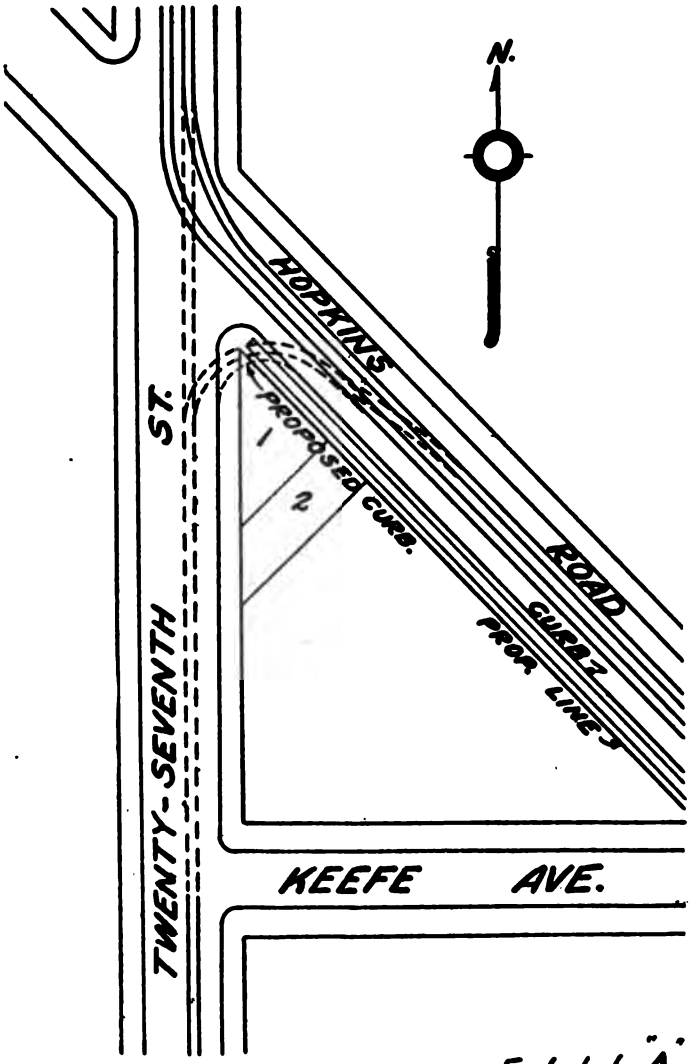

Exhibit "A"

trial court made no findings of fact or conclusions of law, but directed that a permanent peremptory writ of *mandamus* issue. From the judgment of the circuit court entered thereon the defendant appeals.

For the appellant there was a brief by *Clifton Williams,* city attorney, and oral argument by *Mr. Williams* and *Mr. Joseph Bednarek,* assistant city attorney.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

ROSENBERRY, J. In its effort to comply with the orders of the railroad commission requiring it to make the improvements described in the statement of facts, the relator is met by the refusal of the defendant to permit the work to be done.

It is the contention of the defendant that the relator has no franchise for the construction of turnouts, sidetracks, connections, or cross-overs on Twenty-second avenue. This contention is based upon the following facts: The material part of the ordinance granting the franchise under which the relator claims is sec. 4 of the ordinance of January 2, 1900, which contains the following provision:

"Provided further, that in case of the extension of the city limits in the future, then said railway company is hereby authorized and obligated to make extension of any of its lines now or hereafter reaching the city limits as they now exist to the said city limits when so extended, . . . and when any such extension shall be made, all and singular the provisions of this ordinance relating to the operation thereof shall apply the same as though the provisions of this ordinance were made a part of the ordinance requiring such extension."

It is the contention of the defendant that under the provisions of this ordinance, when the relator extended its line beyond the old city limits, the right to construct "all neces-

sary and convenient tracks, turnouts, sidetracks, connections, cross-overs, and switches" was not included because of the fact that the word *operation* is used, and no word relating to the construction of the line is used in connection with it, and therefore only that part of the ordinance which relates to the operation of the line is applicable.

We think this is entirely too strict a construction to place upon the language of this ordinance, and that when under an ordinance adopted pursuant to the provisions of sec. 4 the relator was compelled to extend its lines in accordance with the provisions of sec. 4, the right to construct the necessary turnouts, sidetracks, connections, cross-overs, curves, and switches passed as an incident. *Brooklyn Heights R. Co. v. Brooklyn,* 152 N. Y. 244, 46 N. E. 509; *Detroit Citizens' St. R. Co. v. Board of Public Works,* 126 Mich. 554, 85 N. W. 1072.

The franchise situation at the intersection of Twenty-seventh street (a continuation of Twenty-second avenue) and Hopkins road is substantially as follows: In 1908 the company accepted a franchise to build a double track to Keefe avenue, which was then the northerly limit of the city. Since that time the city limits have been extended north of Keefe avenue on the easterly side of Twenty-seventh street, but on the westerly side of Twenty-seventh street the city limits are bounded by the lines of Keefe avenue, the east half of Twenty-seventh street above Keefe avenue being, therefore, within the city limits, and the west half being without the city limits.

On behalf of the defendant it is admitted that both of the improvements in question are necessary and reasonable and should be made. The contention of the defendant is that, because the relator accepted a franchise to construct a double track on Twenty-seventh street to Keefe avenue, it cannot construct a single track north of Keefe avenue, although admittedly the west side of Twenty-seventh street is not within the city limits, and the common council of the

city of *Milwaukee* could not grant a franchise therefor. By sec. 1 of the ordinance of January 2, 1900, the relator is granted "the right, permission and authority to lay, construct, maintain and operate a single or double track for street railways, for the carrying of passengers, with all necessary and convenient tracks, turnouts, sidetracks, connections, cross-overs, and switches," on the streets described in sec. 4. We have already called attention to the fact that, by the provision of sec. 4, in case of extension of the city limits the relator was required to make an extension of any of its lines reaching the city limits as they had existed, to the city limits as extended.

We consider this provision of the ordinance applicable here, and the mere fact that a double track cannot be constructed under the franchise does not prevent its operating in that part of the streets of which the city of *Milwaukee* has jurisdiction and authorizes a single track to be constructed therein.

While ordinances granting franchises to utilities are in some cases to be strictly construed, they are not to be so construed as to defeat the purpose for which the grant is made. It is contended, however, that a franchise to construct street-car tracks in a street, together with switch tracks, sidetracks, cross-overs, curves, and connections, does not include the right to cut the curb and lay constructions in the sidewalk, because in Wisconsin, and particularly in *Milwaukee,* a sidewalk is not included in the words "street, alley, or part thereof." *Abbot v. Milwaukee,* 148 Wis. 26, 134 N. W. 137. *Abbot v. Milwaukee* was a case involving the right of reassessment for sidewalk improvements made by the city, and it was held that while in its general sense "street" includes sidewalk areas, the words "paving or repaving any street or alley or part thereof" as used in sec. 1210*d* of the Statutes was not intended to cover, and did not cover, sidewalk improvements. Such holding has no application to the facts in this case.

The city of *Milwaukee* is authorized by sec. 1862, Stats., to grant franchises for the use of public streets "for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, . . . with all necessary curves, turnouts, switches, and other conveniences." We are of the opinion that the granting of a franchise by the city of *Milwaukee* to lay tracks necessarily includes as an incident to the grant the right to connect the tracks by means of necessary curves and switches, including the right to cut a sidewalk where that is reasonably necessary for the enjoyment of the right granted.

It is the contention of the defendant that, before such structures are erected in a street, the plan therefor should be approved by the common council and made subject to such conditions as the common council may determine in the interest of the public safety. We find no such requirement, and our attention is called to none.

By the Court.—Judgment affirmed.

STATE EX REL. MCDIARMID and another, Appellants, vs. KNIGHT and others, Respondents.

June 5—June 23, 1920.

Schools and school districts: Creation of consolidated rural schools: Power of town boards and of committee on common schools: Consolidation of districts: Certiorari: Form of judgment: Power of court to amend proceedings reviewed: Reversal of void order.

1. A consolidated rural school district, which is different from the ordinary school district and has other powers, such as furnishing transportation to pupils, can be created only by holding an election of the voters of the district sought to be consolidated as provided by sec. 40.15, Stats. 1919; sec. 40.01 providing merely for the consolidation of ordinary school districts.
2. The judgment on *certiorari* must be one either of affirmance or reversal in whole or in part.

3. Where petitioners wanted a consolidated rural school district so as to provide for transportation of pupils and to have a graded school, and the petition was directed to and acted upon by officers who had no power to create a consolidated rural school district as requested, but did have authority to consolidate school districts into an ordinary school district, the court cannot on *certiorari* amend the petition and all subsequent proceedings to show the consolidation of districts and not the creation of a consolidated rural school district.
4. Though an order of a committee on common schools purporting to create a consolidated rural school district is void for want of jurisdiction and therefore harmless, it may be reversed on *certiorari.*

APPEAL from a judgment of the circuit court for St. Croix county: GEO. THOMPSON, Circuit Judge. *Reversed.*

Certiorari to review the decision and order of the committee on common schools for St. Croix county consolidating school districts numbers 1, 2, and 4 in the town of Hudson into one district to be known as Consolidated rural school district No. 1 of the town of Hudson, St. Croix county, Wisconsin.

The proceedings were begun by a petition signed by voters of the three districts, directed to the town board of supervisors of the town of Hudson, praying that the town board unite said districts into one consolidated rural school district, and assigned as reasons therefor that under such a district transportation of pupils to and from school could be provided for and that a consolidated graded school is better than three ungraded schools.

The town board failed to act and an appeal was taken to the committee on common schools for St. Croix county as provided by sub. (2), sec. 40.01, Stats. 1919. Such appeal recited that a consolidated rural school district was sought to be created and that the petition gave reasons for its creation. The committee on common schools in their resolution that an order of consolidation be made designated the new district as Consolidated rural school district No. 1 of the town of Hudson, St. Croix county, Wisconsin. The

decision on appeal gave it the same designation and so did the order of consolidation. The latter specifically declared that such new district "shall have all the powers and privileges granted to consolidated rural school districts by the statutes whatsoever." The circuit court affirmed the order of the committee on common schools, and the relators appealed.

Spencer Haven of Hudson, for the appellants.

For the respondents the cause was submitted on the brief of *Varnum & Kirk* of Hudson.

VINJE, J. Sub. (1), sec. 40.01, Stats. 1919, gives to town boards of supervisors, upon petition or their own motion, the power to "alter school district boundaries, and to create, consolidate or dissolve school districts." But such altered or consolidated districts remain school districts, having the usual powers of an ordinary school district and no more.

Sec. 40.15, Stats. 1919, provides for the creation of consolidated rural schools by the filing of a petition by fifteen per cent. of the electors and the holding of an election of the voters of the district sought to be consolidated, the vote to be canvassed by the school boards of the respective districts, and if a majority is cast for consolidation a consolidated rural school district shall be deemed organized. Such district has powers different from that of the ordinary school district, among others that of furnishing transportation to pupils within the district to and from school. Now it is evident that a consolidated rural school district was not formed as the statute requires, and that the town board of supervisors and the committee on common schools had no authority to create such a district. All they could do was to create an ordinary school district.

But it is claimed that that is all they did. If so, then the whole proceedings negative the fact, and to make the proceedings correspond to the fact they would have to be amended by the court. The amendment would have to in-

clude the petition as well as all subsequent proceedings which call for a consolidated rural school district. Such amendment the court is powerless to make in any case, and especially so upon *certiorari,* where there must be either an affirmance or reversal in whole or in part. *State ex rel. Nelson v. Emerson,* 137 Wis. 292, 118 N. W. 836. The petitioners evidently wanted a consolidated rural school district so as to provide for transportation of pupils and to have a graded school. They did not proceed according to statute, and the body they applied to had no power to create what was wanted and what in terms is purported to be created. For that reason the order of the committee on common schools purporting to create a consolidated rural school district was null and void and should in all things have been reversed by the trial court.

Though the order was void for want of jurisdiction and therefore harmless, it may nevertheless be reversed on *certiorari. State ex rel. R. Connor Co. v. Wallman,* 110 Wis. 312, 85 N. W. 975.

By the Court.—Judgment is reversed, and cause remanded with directions to reverse the order of the committee on common schools for St. Croix county purporting to create Consolidated rural school district No. 1 of the town of Hudson, St. Croix county, Wisconsin.

KUDER, Plaintiff in error, vs. THE STATE, Defendant in error.

June 5—June 23, 1920.

Penalties: Action for forfeiture: Violation of county ordinance as to speed of automobiles: Civil action or criminal proceeding? Form of judgment: Enforcement: Word "guilty" as involving criminality: Evidence: Judicial notice as to character of highways.

1. An action brought on behalf of a county to recover a sum of money as a forfeiture for the violation of a county ordinance fixing the maximum speed of automobiles on county or state

highways is a civil action; and a judgment in such action, which is in form and effect one which could properly be entered only in a criminal proceeding, must be reversed.

2. The distinction between a criminal proceeding and a civil remedy to recover a forfeiture is so substantial that a judgment against a defendant in one is no bar to a judgment against him in the other upon the identical state of facts.
3. The knowledge of the trial court, as an individual, of facts as to a road being a county or state rather than a town highway, is not the kind of knowledge that is included in the broad field of subjects of general knowledge of which a court, as such, may take judicial notice.
4. The word "guilty" in a judgment in a civil action for collection of a forfeiture does not involve the element of criminality, any more than an adjudication of guilty of negligence in a personal injury case.
[5. Whether a judgment in a civil action for collection of a forfeiture, which may be brought under sec. 3303, Stats., may, in the absence of a provision to that effect in the ordinance itself, provide for a jail sentence in default of payment of the adjudged penalty under sec. 3302, Stats., not decided.]
6. An action brought to collect a penalty for the violation of a county ordinance cannot be construed as a prosecution under a penal statute of the state for the violation of which the defendant may be properly committed to jail.

ERROR to review a judgment of the municipal court for the Eastern district of Waukesha county: J. E. THOMAS, Judge. *Reversed.*

The county board of *Waukesha County* enacted an ordinance fixing a maximum speed limit of not exceeding thirty miles per hour for the operating or driving of an automobile or other similar vehicle on any highway in said county which is maintained at the expense of the county and state or either of them.

It further provided that any person violating such ordinance shall forfeit and pay to the county a penalty of not less than $10 nor more than $100 for each such violation, together with the costs of any such prosecution for the collection of such forfeiture.

Sec. 3 thereof further provided that the forfeitures col-

lected for the violation of such ordinance shall be paid to the county treasurer of said county and placed in the highway maintenance fund.

A complaint for a criminal warrant was sworn to by the traffic officer of said county, alleging a violation by the plaintiff in error on August 21, 1919, at the town of Brookfield in said county, of the provisions of said ordinance, in that while driving and operating a certain automobile along and upon a highway maintained by the said county he did unlawfully drive the same at a rate of speed greater than thirty miles per hour, and praying that said plaintiff in error be arrested and held to answer to the county of *Waukesha* therefor under the provisions of said ordinance.

The plaintiff in error was arrested upon a warrant so directed in such complaint issued out of the municipal court for the Eastern district of Waukesha county.

No objections appear to have been interposed by the defendant before or at the trial as to the course of procedure theretofore taken, and no demand for a jury trial appears to have been made. The case was tried by the judge of said municipal court and witnesses testified for both sides.

At the close of the testimony counsel for the defendant moved to dismiss the action and discharge the defendant. The motion was overruled and the court said:

"I find that the defendant is guilty of speeding, and the sentence of the court is that you, *Paul Kuder,* pay a fine of $25 and costs, or twenty days in the county jail."

Thereupon a formal sentence was signed by said municipal judge entitled "The State of Wisconsin against *Paul Kuder,*" and reading as follows:

"The sentence of the court now is that you, *Paul Kuder,* pay a fine of $25 and costs taxed at the sum of $16.42, and in default of payment thereof that you be imprisoned in the county jail of said county, at hard labor, for the term of twenty days, or until said fine and costs are paid; or you shall be thence discharged by due course of law."

Thereupon a writ of error was issued out of this court to review said record, proceedings, and judgment.

For the plaintiff in error there was a brief by *Hoyt, Goff & Morgan* of Milwaukee, and oral argument by *W. J. Morgan.*

For the defendant in error there was a brief by *D. S. Tullar,* district attorney of Waukesha county, and oral argument by *Allen D. Young,* assistant district attorney, and *J. F. Baker,* assistant attorney general.

ESCHWEILER, J. The plaintiff in error contends that the evidence in the court below was not sufficient to justify a finding that the defendant had violated the ordinance. We have examined the record and think that the evidence therein disclosed was sufficient to justify the reasonable inference drawn therefrom by the trial court that there had been an excessive speed maintained by the automobile in which the plaintiff in error was being driven by his chauffeur at the time in question.

The testimony by the road patrolman upon whose complaint the warrant was issued was that the driving took place on the Blue Mound road and then on the Pewaukee road in the town of Brookfield, Waukesha county. From the testimony it would also appear that a part of the highway on which the fast driving was done was of concrete. No further description of the highway was given than as above. Plaintiff in error now insists that the evidence was not sufficient to warrant a finding that the speeding had been done upon a county or state highway such as was designated in the county ordinance above set forth. The record discloses, however, that no objections were interposed or efforts made to raise such question on the trial. Were it necessary now to decide this question, we entertain very serious doubts as to its being a matter of which a trial court might take judicial notice as suggested by defendant in error. That the trial court as an individual might have

knowledge of facts as to its being a county or state rather than a town highway would not be the kind of knowledge that is included within the broad field of subjects of general knowledge of which a court as such may take judicial notice. Were this a trial by jury the court would have no right to instruct the jury, from his individual knowledge of such a local situation, that such highway was or was not of such particular kind, any more than he might as to the physical condition of a particular portion of the highway. *Shafer v. Eau Claire,* 105 Wis. 239, 244, 81 N. W. 409. See, also, *Johnson v. Superior R. T. R. Co.* 91 Wis. 233, 237, 64 N. W. 753; Jones, Evidence (2d ed.) §§ 133, 134.

The judgment of the court below, however, must be reversed and set aside because it is in form and effect a judgment which could properly be entered only in a criminal proceeding instituted by the state against a defendant for a violation of the penal statutes of the state. This action, however, was one brought, not on behalf of the state but on behalf of the *quasi*-municipal corporation, the county of *Waukesha,* to recover a sum as a forfeiture, and which when recovered was to be turned in to the county treasury and under an ordinance which in no manner attempted to provide for the imprisonment of a defendant in case of his failure to pay any such sum so adjudged.

In the former class a convicted defendant may be sentenced to imprisonment as well as punished by a fine, whether the offense be of the class designated as a felony or the lesser form of misdemeanor; the second class, and the one to which this action belongs, is a civil remedy providing for the recovery of a forfeiture for the breach of any ordinance which it is within the proper province of a *quasi*-municipality, such as the county here, to enact.

The distinction between the two is so substantial that a judgment against the defendant in the one is no bar to a prosecution and judgment against the same defendant in the other upon the identical state of facts. *Ogden v. Madi-*

son, 111 Wis. 413, 87 N. W. 568; *State ex rel. Dunlap v. Nohl,* 113 Wis. 15, 24, 26, 88 N. W. 1004; *Koch v. State,* 126 Wis. 470, 478, 106 N. W. 531; *Stoltman v. Lake,* 124 Wis. 462, 102 N. W. 920; *State v. Hamley,* 137 Wis. 458, 119 N. W. 114; *C. Beck Co. v. Milwaukee,* 139 Wis. 340, 348, 120 N. W. 293; *Milwaukee v. Ruplinger,* 155 Wis. 391, 395, 145 N. W. 42; *Milwaukee v. Locher & S. Co.* 164 Wis. 167, 159 N. W. 815; *Milwaukee v. Filer & Stowell Co.* 161 Wis. 426, 154 N. W. 625; *Baraboo v. Dwyer,* 166 Wis. 372, 165 N. W. 297.

It is perhaps unfortunate that, in many of these actions brought to recover such penalties as are instanced in many of the cases above cited, the usual form of the judgment is that the defendant is found "guilty" of a violation of the specified ordinance, and that the same word "guilty" is used upon judgment of conviction in prosecutions for violation of penal statutes. The use of the term "guilty," however, in the former instance does not necessarily carry with it the idea of an adjudication that the defendant has done that which comes under the generic term "crime," which includes the specific terms "felony" and "misdemeanor." As used in the civil action for collection of forfeiture, it involves no more the element of criminality in the ordinary acceptance of the term than does the use of the word "guilty" as so generally used in the verdicts in actions for personal injury in which either one of the parties may be found to be "guilty" of a want of ordinary care proximately contributing to an injury.

The question whether a judgment against a defendant in such a civil action as this, which may be brought under sec. 3303, Stats., may, in the absence at least of a provision to that effect in the ordinance itself, provide for imprisonment in the county jail in default of payment of the adjudged penalty under sec. 3302, Stats., is not before us and we express no opinion on such question.

Counsel for *Waukesha County* insists that, the evidence being sufficient to show a violation of sec. 1636—49, Stats., providing for a maximum speed of thirty miles per hour on any highway outside of the corporate limits of a city or village and a violation whereof is punished under sec. 1636—54 by a fine of not less than $10 nor more than $100, taken in connection with sec. 4633, which authorizes the court to sentence by commitment to the county jail until such fines and costs are paid, this should be considered as a prosecution under such statute, and that the conviction and sentence of the court below should therefore be sustained as though this action were brought in the original instance under the state law. It is sufficient to say that a civil action brought to collect a penalty payable to the county treasurer of *Waukesha County* cannot undergo any such form of judicial transformation so as to become an action to punish as for a misdemeanor a violation of a penal statute for which a defendant may be properly committed to jail.

From what appears, therefore, from this record now before us upon this writ of error, the judgment of the court below was unwarranted in manner and form and must be reversed and the proceedings dismissed.

By the Court.—The judgment of the court below is reversed, and the action remanded with directions to dismiss the proceedings.

STATE EX REL. WISCONSIN TRUST COMPANY and others, Appellants, vs. PHELPS, County Clerk, etc., Respondent.

January 16—July 3, 1920.

Taxation: Trusts administered in Wisconsin: Dividends paid direct to beneficiary as income of trustee: Constitutionality of income tax law: Waiver of objection by taxpayer: Appeal: Question first raised on rehearing.

1. The provisions of a testamentary trust directing that a designated Wisconsin trust company act as trustee, and in case of

its refusal another Wisconsin trust company be appointed, that the trust funds be invested in securities which the laws of Wisconsin permit trustees to invest in, and that the county court of Milwaukee county or its successor fill vacancies in the trustees, clearly indicate that the testator intended the trust to be administered in Wisconsin.

2. Where a Wisconsin trust company, administering a trust in Wisconsin, consented to a Pennsylvania corporation paying dividends at Philadelphia to a beneficiary of the trust residing in that city, receipts being signed by the beneficiary and forwarded to the Wisconsin trust company, the trustee crediting the income account of the trust estate with the amount paid to such beneficiary and debiting the same account with the amount when the receipt of the beneficiary was received, and accounting to the county court for the amount so credited and debited, the transaction constituted in law a payment of the income to the Wisconsin trust company, and such income was "received" by the Wisconsin trust company within the meaning of sub. 3, sec. 1087*m*—2, Stats., and was properly assessed for income taxation.
3. Where an income taxpayer did not claim exemption in his return, but opposite the place for exemptions for the taxpayer wrote "None," and the same word opposite the exemption as to children, he waived his claim that the assessment against him was invalid because contravening sec. 1, amendm. XIV, Const. U. S., in that the income tax law grants no exemptions to nonresidents while it does to residents.
4. A question not raised in the trial court and not presented on argument in the supreme court, but only on motion for rehearing, is presented too late.

ESCHWEILER and ROSENBERRY, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

Certiorari to review the validity of an assessment of $70,607.87 against the relators as trustees under the will of Nathan Hamburger, deceased, for income taxation for the year 1917. For the contents of the Hamburger will and a statement of the trust, trustees, and beneficiaries created thereby reference is made to *State ex rel. Wis. T. Co. v. Widule,* 164 Wis. 56, 159 N. W. 630, where the same was set out adequately for the purposes of this case. For the

year 1917 Gimbel Brothers, a Pennsylvania corporation, doing business both in Philadelphia and in Milwaukee, declared and paid dividends and interest in the sum of $84,060 to the Hamburger estate, of which sum $13,452.13 was earned by the Wisconsin business of the corporation and upon which it paid an income tax in this state, leaving $70,607.87 taxable if received by the *Wisconsin Trust Company* within the meaning of sub. 3, sec. 1087*m*—2, Stats.

Prior to 1917 the dividends and interest from Gimbel Brothers had been paid to the *Wisconsin Trust Company* and by it returned as taxable income. In 1917, instead of paying such dividends and interest directly to the *Trust Company,* Gimbel Brothers asked permission from it to pay them to *Mrs. Behal,* then a resident of Philadelphia. Permission was granted and the dividends and interest were paid to *Mrs. Behal* by Gimbel Brothers in Philadelphia. Whenever a payment was made *Mrs. Behal* would sign and send to the *Wisconsin Trust Company* a receipt in this form: "$——. Received of *Wisconsin Trust Company, Bertha Behal,* and *Ellis A. Gimbel,* Trustees, $—— dollars. *Bertha H. Behal,*" filling in the amount received. All receipts and disbursements of the trust estate, including the payments made by Gimbel Brothers to *Bertha H. Behal,* were entered on the books of the trust estate and accounted for by the *Wisconsin Trust Company.* It had possession of all the assets of the trust estate, kept all the books, and accounted to the county court.

The judgment of the circuit court confirmed the assessment in question, and the relators appealed.

For the appellants there were briefs by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Nathan Glicksman.*

For the respondent there were briefs by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, and *Daniel*

W. Sullivan, first assistant district attorney; and the cause was argued orally by *Mr. Sullivan* and *Mr. Brossard.*

The following opinion was filed March 9, 1920:

VINJE, J. The single question for decision on this appeal is, Did the *Wisconsin Trust Company* receive the income of the trust estate for the year 1917 within the meaning of sub. 3, sec. 1087*m*—2, Stats. 1917? If it did, then under the provisions of sub. 5, sec. 1087*m*—10, its duty was to report it for taxation and pay an income tax thereon. A solution of the question will be materially aided by a reference to the conditions of the trust. The *Wisconsin Trust Company* was made a trustee with the provision that if it refused to act another Wisconsin trust company should be appointed in its stead. The funds of the estate were to be invested in such securities as the laws of the state of Wisconsin permit trustees to invest in, and vacancies in the trustees were to be filled by the county court of Milwaukee county or its successor, and of course the trustees must account to the county court of Milwaukee county. These provisions indicate quite clearly that the testator intended the trust to be administered in Wisconsin, and we must presume, in the absence of clear proof to the contrary, that the trustees have complied with the provisions of the trust.

It appears without dispute that the *Wisconsin Trust Company* has at all times been in the physical possession of the assets of the trust estate, has kept all the accounts thereof, and has prepared and filed its reports to the county court, the other trustees joining therein to the extent of certifying that they believe such reports to be correct.

Now let us see just what was done in this case as to the disputed income. The *Wisconsin Trust Company* said to Gimbel Brothers, You may pay the income to *Mrs. Behal* instead of to me, as you request; but I must be advised of all the transactions between you so that I can correctly keep

and report the trust account; and proper receipts must be sent me by *Mrs. Behal* to protect me in my account to the county court. Pursuant to such permission and direction the income was paid by Gimbel Brothers of Philadelphia to *Mrs. Behal,* presumably as a matter of convenience, since *Mrs. Behal* lived in Philadelphia. The *Wisconsin Trust Company* credited the income account of the estate with the amount paid to *Mrs. Behal* and debited the same account with the amount when *Mrs. Behal's* receipt was received, and it accounted to the county court for the amount so credited and debited.

In view of the provisions of the trust, the method of conducting the trust estate, as well as the legal effect of the mode of payment, we conclude that the transactions constituted in law a payment of the income to the *Wisconsin Trust Company* though no cash was received by it. To hold otherwise were to permit shadow and not substance to control and to invite evasions of the payment of income taxes by an exchange of receipts in lieu of cash or its equivalent.

Since we reach the result that the income assessed was received by the *Wisconsin Trust Company* within the meaning of sub. 3, sec. 1087*m*—2, the case falls within the rule of *State ex rel. Wis. T. Co. v. Widule,* 164 Wis. 56, 159 N. W. 630, and not within that of *Bayfield Co. v. Pishon,* 162 Wis. 466, 156 N. W. 463. A number of collateral questions argued are rendered immaterial by the result reached upon the main facts of the case and are therefore not considered.

By the Court.—Judgment affirmed.

ROSENBERRY, J., dissents.

ESCHWEILER, J. (*dissenting*). The majority opinion holds that the *Wisconsin Trust Company* received the in-

come in question and because it did so receive it an income tax must be paid thereon.

The payment without the state of Wisconsin by Gimbel Brothers Company of the income in question to one of the three joint trustees was a lawful transaction, its validity is not questioned, and the payment to such one trustee by the Gimbel Brothers Company was an absolute discharge of its obligation to the trust estate. The *Wisconsin Trust Company* could not insist or require that the payment of this dividend should be made to it rather than to *Mrs. Behal.*

That the *Wisconsin Trust Company* kept the accounts of the trust and made an entry therein of the payment of this dividend is a mere matter of bookkeeping and does not convert that which is not a payment to it into a payment.

The majority hold that it was the evident intention of the creator of the trust that the securities should be held within the state of Wisconsin and that the trust should be administered within this state. That a trust is to be administered within the state is not of itself sufficient to create such a liability for an income tax was directly and squarely held by this court in *Bayfield Co. v. Pishon,* 162 Wis. 466, 156 N. W. 463. Unless it is intended by the majority opinion herein to overrule that case, then the fact that this is a trust to be administered within the state of Wisconsin does not, on that ground, render the income lawfully paid without the state subject to the income tax.

The majority opinion, in effect holding that because the securities are here the dividends are constructively here, overlooks, in my judgment, the clear and heretofore well recognized distinction between a tax on personal property and a tax upon the recipient of an income therefrom (*State ex rel. Sallie F. Moon Co. v. Wis. Tax Comm.* 166 Wis. 287, 290, 163 N. W. 639, 165 N. W. 470), and the further doctrine that the taxing power of the state is not extraterritorial. Both doctrines were clearly stated in *State ex*

rel. Manitowoc Gas Co. v. Wis. Tax Comm. 161 Wis. 111, 152 N. W. 848, particularly on pages 114 and 115, where it is said, referring now to the former:

"If the tax be on property, it, or its lawfully constituted situs, must be found within the state. If an interest in property is taxed, the situs of either the property or interest must be found within the state. If an income be taxed, the recipient thereof must have a domicile within the state or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein."

If that decision correctly stated the law, then the income in this case was not subject to taxation because the lawful recipient thereof, namely *Mrs. Behal,* did not have a domicile within the state, and neither the property nor the business of Gimbel Brothers Company, out of which the income issued, was situated within the state. See, also, *Superior v. Allouez Bay Dock Co.* 166 Wis. 76, 80, 164 N. W. 362.

That the questions concerning property taxation are distinct and separate from those relating to income taxation, see, also, notes in L. R. A. 1915C, 949; *De Noailles' Estate,* 236 Pa. St. 213, 84 Atl. 665, 46 L. R. A. N. S. 1167, 1172.

In the former appeal concerning this same trust estate in 164 Wis. 56, 159 N. W. 630, a similar assessment for income tax on a similar dividend was sustained because the fund was in that instance received by the Wisconsin trustee within the state of Wisconsin. The same result is now reached where the income is not paid as a matter of fact to the trustee within the state of Wisconsin, but was legally and properly paid to one without the state. The *Wisconsin Trust Company* was held liable in the first case because it did receive the dividend out of which it could and was required to pay the income tax. It is now required to pay a similar income tax upon that which it did not receive into its legal custody and which it is under no legal obligation to

collect and which was lawfully paid somewhere else to someone else. All that was said in the former opinion, therefore, is now made idle.

I think the present decision is also contrary to the holding of this court in *Ashland Co. v. Knight,* 129 Wis. 63, 108 N. W. 208, as to the invalidity of an attempted reassessment of personal property to an agent not then in possession or owner of the property.

The following opinion was filed July 3, 1920:

PER CURIAM. We are asked to grant a motion for a rehearing upon the ground, among others, that the income tax assessment in question in this case is invalid because it contravenes sec. 1 of the Fourteenth amendment of the constitution of the United States, and because our income tax law grants no exemptions to nonresidents while it does to residents, and therefore constitutes invalid taxation under the federal constitution, as decided in the case of *Travis v. Yale & Towne M. Co.* 252 U. S. 60, 40 Sup. Ct. 228. The latter question was not raised in the court below and was not presented upon the argument in this court. Moreover, it appears from the record that an exemption was not claimed in the income tax return made by the relator. On the other hand, opposite the word "Exemptions" for the taxpayer in such return is written the word "None," and the same word appears opposite the exemption as to children. It is clear, therefore, that the relator has waived the claim now made; and that if not waived the question is presented too late.

By the Court.—The motion for a rehearing is denied, with $25 costs.

STATE HISTORICAL SOCIETY OF WISCONSIN, Appellant, vs. FOSTER, Trustee, and another, Respondents.

March 10—July 3, 1920.

Wills: Testamentary trust: Termination: Vesting of estate in remainderman subject to annuities: Payment of annuity is trustee duty: Costs in action to construe will.

1. Under a will making specific bequests and giving the residue of the estate to trustees to manage and pay an annuity to testator's son for life, and if he marries an annuity to his wife, and if she survives him the two annuities to her till she dies or remarries, and in case the son dies leaving issue giving the residue to them, and directing that the trusts shall cease on such payments being made, but if the son die without issue giving the residue to a society, and directing that on the vesting in the society of the residue the trust shall cease,—the trust, in the latter contingency, ceases as to all the residue, and the estate vests, with right of possession, in the society, subject to payment of the widow's annuities, the direction for payment by the trustees being directory merely, the chief object being to place the *corpus* of the estate in the society on the happening of the contingency stated.
2. A society which is authorized by its charter to hold and manage property and to receive it by devise or gift can receive property by devise or gift subject to a reasonable lawful condition, such as paying an annuity, even if the society is not authorized to act as trustee, payment not being the performance of a trustee duty.
3. The society taking the estate subject to a charge of an annuity fulfils the mandate of the will that it use the income for purposes for which the society was organized when it uses all the income over and above the charge for such purposes.
4. The good faith and propriety of litigation for the construction of a will as to when a testamentary trust ceases not being questionable as to either party, each is entitled to payment of his taxable costs in the supreme court, to be paid out of the trust estate.

APPEAL from a judgment of the circuit court for Dane county: JAMES WICKHAM, Judge. *Reversed.*

Action to construe a will. On the 21st day of August, 1903, George B. Burrows, a resident of Madison, Wis-

consin, executed his will, and on the 1st day of March, 1907, he added a codicil thereto, but the latter does not affect any question presented for determination. After making a number of specific bequests the will provides:

"*Ninth.* I give, bequeath, and devise to my executors and trustees hereinafter named, except my family lot in Forest Hill cemetery, near Madison, all the rest and residue of my estate, whether real or personal, wherever situated, including all my life insurance policies, and the sums to be paid thereon at my decease, by whatever company or companies such policies have been issued to me, but upon the following trusts:

"1. To pay from my personal estate my funeral expenses and all just debts.

"2. From the income arising from my said estate to pay to my son, George Thompson Burrows, the sum of one thousand dollars annually for the term of three years after my decease, to be paid in quarterly payments at the end of each and every three months, and after the termination of said three years to pay him the sum of fifteen hundred dollars annually during his life, to be paid in the manner above stated.

"3. That in case my said son marries, then in addition to the above I will and direct that my said executors and trustees pay to the wife of my said son the sum of five hundred dollars, to be paid her annually in quarterly instalments in the same manner they are directed to pay said annuity to my son. In the event of the wife of my said son surviving him, then the said annuity herein provided to be paid to my said son and to his wife shall all be paid to the said wife until her death or remarriage, when all annuities shall cease; provided, however, that if my said son and his wife shall, at the death of the survivor of them, leave a child or children, fruit of their marriage, then my said executors and trustees shall pay such sum or sums from my estate to support and maintain and educate such child or children as the proper court having jurisdiction of my estate shall deem necessary and expedient until such child or children shall respectively arrive at the age of twenty-one years."

Then follow seven subsections giving to his executors and trustees full power to manage the estate, compromise claims,

convert real estate into personal property and *vice versa,* continue his business office in Madison, plat property if it seems desirable, buy and sell real estate, stocks, or other property, and in general to manage the estate for its best interests as judged by them, including such interests as he may hold in partnership with others. The will then provides:

"*Tenth.* In case my son, George Thompson Burrows, shall leave surviving him lawful issue, then I give, bequeath, and devise to the child or children so surviving, all the rest and residue of my estate of every nature and kind wherever situated, not herein otherwise specifically bequeathed or devised, to be paid to said child, or if he leaves surviving him more than one child, then to said children, share alike, upon arriving at the age of twenty-one years, respectively, and upon the payment to said child or children of all the rest and residue of my estate, then the trusts herein created shall cease.

"*Eleventh.* In the contingency that my said son, George Thompson Burrows, at his death shall leave no child or children, born in lawful wedlock, surviving him, then in that case I give, bequeath, and devise all my said estate of whatever nature or kind or wherever situated, not hereinbefore otherwise specifically given, bequeathed, and devised, to the *State Historical Society of the State of Wisconsin,* upon this express condition: that the fund so received from my estate shall always be kept separate and distinct from the other funds of said society, and that no part of the principal thereof shall be diverted or used, and to be always known as the 'George B. Burrows Fund.'

"That the income shall be used for the promotion of the objects and purposes of said society as the board of curators of said society shall direct. That upon the taking effect and the vesting in said society of said rest and residue of my said estate in said society, then the trust herein created shall cease."

Fred M. Brown and Charles Pressentin of Madison and *Frank H. Foster* of Chicago were appointed executors and trustees and were empowered to act without giving a bond. Fred M. Brown declined to act and the other two managed

the estate until on or about December 1, 1916, when Charles Pressentin died, since which time *Mr. Foster* has managed the estate.

Testator's wife was dead at the time the will was made and he left no children surviving him except one son, George Thompson Burrows, then unmarried and about thirty-six years of age. The testator died February 25, 1909. March 5, 1909, the son married, and in October, 1916, he died leaving *Celeste K. Burrows;* his widow, then about thirty-eight years of age, him surviving. He left no lawful issue of the marriage.

The inventory of the executors showed real estate of the value of $99,762.50 and personal property of the value of $118,296.11. The last report of the trustee states that the personal property amounts to $206,189, but the value of the real estate is not given. The court found the value of the whole estate to be about $380,000.

The plaintiff claims that upon the death of the son without lawful issue the estate vested in it, and the possession thereof should be turned over to it, charged, however, with the payment by it of the annuity of $2,000 to *Celeste K. Burrows* so long as she lives or remains a widow; or, in case it is not entitled to possession of the whole estate, that it is entitled to all thereof except so much as it is necessary to leave in the hands of the trustee to meet the annuity due the widow.

The defendant trustee contends that the whole estate must remain in his hands until the widow dies or remarries. The trial court held with the trustee, and the judgment construing the will states:

"That the true meaning and intent of the said will of George B. Burrows, deceased, and the codicil thereto, set forth in the complaint herein, is that the trust thereby granted shall not be terminated until all legacies and annuities provided for therein shall have been fully paid and discharged; and that the annuity of said *Celeste K. Burrows*

shall be paid by the trustee out of the income of the trust property."

From such portion of the judgment the plaintiff appealed.

For the appellant there were briefs by *Jones & Schubring* of Madison, and oral argument by *Burr W. Jones* and *E. J. B. Schubring.*

For the respondent *Foster* there was a brief by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *Harry L. Butler* and *Ray M. Stroud.*

The following opinion was filed April 6, 1920:

VINJE, J. It is evident that the primary purpose of the testator was to pass his real estate to the lawful issue of his son, if any, to be paid such issue at the age of twenty-one years. It is also evident that failing such issue the estate vested in the plaintiff. Under the scheme of the testator the duration of the trust period was uncertain. Except as to the annuity it was to be terminated by the occurrence of either of two events: first, by the arrival at majority of all the lawful issue of his son; second, by the death of his son without lawful issue. The death of the son without marriage might occur at any time. This would terminate the trust. The son might marry and yet die without lawful issue. This might occur at any time, and did in fact occur in October, 1916. This terminated the trust by the terms of the will. If his son left lawful issue, then the trust must be administered until such issue reached majority. It will therefore be seen that in all probability the trust period would be one of considerable duration. Hence the full power given the trustees to manage the estate and to change the form of assets. But nowhere in the will do we find any provision for the continuance of the trust except as to the annuity beyond the contingencies mentioned therein, namely, death of the son without lawful issue, or arrival of lawful issue at majority. These fix the limit of duration of the trust period as expressed in paragraphs 10 and 11.

The trial court found that the estate did not vest with the right of possession in the plaintiff until the termination of the annuity to the widow. This conclusion, we think, is not sustained by the language of the will. In case of failure of lawful issue to the son there is a present absolute unrestricted devise of the estate to plaintiff and a direction that "the trust herein created shall cease." It is true the annuity to the widow is a part of the trust, but it is quite evident that what the testator had in mind, when he said in the eleventh paragraph "then the trust created herein shall cease," referred to the trust to plaintiff and not to the annuity or to any other trust created by the will; none other but the annuity was left.

There would be some basis for construing the will to the effect that the annuity to the widow ceased upon the death of the son without lawful issue; but both plaintiff and trustee agree that such should not be the construction. In view of the specific language in paragraph 9 that the annuity to the wife shall be paid "to the said wife until her death or remarriage, when all annuities shall cease," we conclude that it was the intention of the testator that the widow should continue to receive the annuity after the estate vested in the plaintiff. The duration of the annuity period is definitely fixed in paragraph 9 to be coterminous with widowhood or death, and such specific direction must be deemed to control the general language in paragraph 11 to the effect that the "trust herein created shall cease." The result is that upon the death of the son without lawful issue the estate vested in the plaintiff subject to the payment of the annuity to the widow.

Counsel for the trustee argue that it was the meaning of subsection 3 in paragraph 9 that the annuity therein provided for to the wife should be paid her by the trustee. This, we think, is the natural construction of the language used. But such language cannot override the express provision that the estate shall vest in the plaintiff upon the death

of the son without lawful issue. Had the testator intended that the estate should be administered by the trustee until the annuity to the widow terminated he would not have used the language of a present devise and direction for a cessation of the trust that he did in paragraph 11. When many contingencies may occur, as there might under the terms of this will, it is very difficult, if not impossible, to provide in detail just what shall be done in an administrative way under each contingency as it may arise. Therefore, construing the language used as a direction to the trustee to pay the annuity to the widow, such provision in a case like this, where the chief object of the trust is to place the *corpus* of the estate in a specified devisee upon the happening of a certain contingency, will be held to be directory merely and to permit the estate to pass to the *cestui que trust* charged with the payment thereof. The payment of the annuity is the main thing—who pays it out of the estate is a mere incident yielding readily to the main purposes of the testator as disclosed by the whole scheme of the will. The facts show that the cost of managing the trust estate will be less in the hands of the plaintiff than in those of the trustee, who, so far as the evidence shows, has managed the estate both efficiently and economically. It is also apparent that testator was a strong supporter of plaintiff's activities and that next to his own blood it stood highest in his affections. It is not to be supposed that, had he contemplated the contingencies that have happened, he intended to exclude plaintiff from the possession of the estate for perhaps a quarter of a century or more for the sole purpose of having the trustee and not the plaintiff pay the annuity to the widow. The latter says she is perfectly willing to receive the annuity from plaintiff if her interests are properly secured, and the trustee frankly states that the only interest he has in the matter is to see the will of the testator carried out. This is certainly a laudable position for both to take, and it renders the labor of the court pleasanter, since there is an elimination of per-

sonal motives. In saying this the court is not unmindful of its duty to ascertain and carry out the intent of the testator as expressed in his will. Such intent is paramount, and overrides the views of both trustee and beneficiaries. But it is not amiss for the court to felicitate itself upon the rather unusual situation where the testator's evident intent coincides with that of all parties concerned in the litigation.

The trustee argues that plaintiff's charter does not authorize it to act as a trustee. We shall not express any opinion upon this subject—but content ourselves with saying that, since it authorizes plaintiff to hold and manage property and to receive it by devise or gift, it certainly authorizes it to receive property by devise subject to reasonable lawful conditions, such as charged with the paying of an annuity during widowhood or life of a person. The payment of such an annuity is not the performance of trustee duties. It is a specific charge upon property passing by devise and may be executed by any one competent to receive property by devise.

He also claims that, since the will provides that all the income from the estate after it passes to the plaintiff must be used for the purposes of its organization, the payment of this annuity to the widow would run counter to the will because devoted to other purposes than those embraced within plaintiff's charter. It is a sufficient answer to this to say that all the income of the estate is devoted to the purposes specified in the will, namely, the payment to the widow of the annuity and the balance for the use of plaintiff. When the plaintiff takes the estate subject to a charge created by the will it fulfils the mandate of the will when it uses all the income coming to it, over and above the charge, for the purpose specified. The sum necessary to produce the annuity never creates income for plaintiff till the payment of the annuity ceases as prescribed by the will.

Since the estate is valued at upwards of $380,000 and the annuity is only $2,000, and since we have held that the

estate, subject to the payment of the annuity, passed to plaintiff upon the death of the son without lawful issue, the question raised as to whether the will contemplates that the annuity shall be paid out of anything but income becomes a moot question merely and need not be determined.

The good faith and propriety of this litigation cannot be questioned as to either of the parties. Each is therefore entitled to recover his taxable costs in this court to be paid out of the trust estate.

The part of the judgment of the trial court appealed from is reversed, and the cause remanded with directions to adjudge that it was the intent of the will that upon the death of the son, George Thompson Burrows, without lawful issue the estate vested in the plaintiff subject to the payment by it of the annuity to the widow, and that it is entitled to the possession, management, and use thereof; that if the plaintiff and the widow shall concur in a reasonable provision for securing the payment of the annuity to her, such provision shall be incorporated in the judgment. Should they fail to do so, the trial court will determine the conditions of security, and if necessary take further evidence for such purpose.

By the Court.—It is so ordered.

A motion for a rehearing was denied, with $25 costs, on July 3, 1920.

KRUEGER, Respondent, vs. CHASE, Trustee, Appellant.

April 6—July 3, 1920.

Physicians and surgeons: Malpractice of dentist: Pieces of tooth and filling escaping into patient's lung: Negligence: Proximate cause: Opinion evidence: Weight on appeal.

1. In an action against a dentist for malpractice, the evidence is *held* insufficient to show that he was negligent in failing to protect the patient's throat, or that his negligence, if any, in failing to discover a filling and particles of a tooth which

escaped into plaintiff's lung was the proximate cause of the injury, in that it did not appear that anything more could have been done than was done by the dentist to prevent their escape into her throat if they had been discovered.

2. Where it is claimed that the dentist was negligent in failing to discover a filling when examining teeth prior to removing them, it must be proved, and not left to conjecture, that if the filling had been discovered the operation would have resulted differently.
3. Where a verdict based on opinion evidence does not commend itself to the court as reasonable or sound, it will not be given the weight accorded to a verdict resting upon inferences drawn from facts as distinguished from mere opinions.
4. What would constitute ordinary care on the part of a dentist in removing teeth, to prevent a filling and particles of a tooth from entering the patient's throat, is to be determined by the testimony of experts and not as a matter of common knowledge.

APPEAL from a judgment of the municipal court of Brown county: CARLTON MERRILL, Acting Municipal Judge. *Reversed.*

Malpractice. G. R. Hickey is a dentist engaged in the practice of his profession at Green Bay. As a result of a prior examination and consultation, on January 18, 1918, the plaintiff went to St. Vincent Hospital, where she was anesthetized, her family physician, Dr. R. M. Burdon, administering the anesthetic, and Dr. Hickey removed eleven teeth. Just prior to the operation Dr. Hickey again examined the plaintiff's mouth and teeth, discovered no fillings, and discovered no fillings at the time the teeth were pulled. At the same time Dr. Burdon examined the plaintiff's mouth, and he saw no fillings in any of the teeth. The next day the plaintiff commenced to cough, thought that she was suffering from a cold, and pneumonia developed, for which Dr. Burdon treated her for four or five weeks. The plaintiff claims that six weeks after the operation she coughed up two pieces of tooth, and eleven weeks and five days after the operation coughed up a large silver filling, about one pennyweight in weight. The plaintiff had an abscess in her right

lung, it being conceded on all sides that the presence of the pieces of tooth and the filling would be sufficient to account for the abscess and pneumonia. It was the claim of the plaintiff that Dr. Hickey had not used proper care to prevent the escape of the filling and pieces of tooth into her lungs, and that by reason of his negligence and the unskilful manner in which Dr. Hickey performed his work he was liable to the plaintiff for damages.

The case was tried before the court and a jury, and the jury found by special verdict: (1) that the plaintiff was injured by the filling of a tooth escaping into her lung; (2) that the plaintiff was injured by pieces of tooth escaping into her lung; (3) that the defendant in extracting plaintiff's teeth and in his treatment and care of her failed to exercise such reasonable care and skill as is ordinarily possessed and exercised by dentists in good standing, etc.; (4) that the failure to use such care and skill was the proximate cause of the plaintiff's injury; (5) that Dr. Hickey did not use ordinary care and skill by reason of his failure to discover before extraction that there was a filling among the teeth extracted; (6) that the failure to use such skill and care was the proximate cause of the plaintiff's injury; and assessed damages at $6,500.

There were proper motions to preserve the questions raised here. Plaintiff had judgment for the amount of the verdict, from which the defendant appeals.

For the appellant there were briefs by *Minahan, Minahan, Minahan & Duquaine* of Green Bay, and oral argument by *Eben R. Minahan.*

For the respondent there was a brief by *Classon & Whitcomb* of Oconto, attorneys, and *Allan V. Classon* of Oconto and *M. E. Davis* of Green Bay, of counsel, and oral argument by *Mr. Allan V. Classon* and *Mr. Davis.*

The following opinion was filed May 4, 1920:

ROSENBERRY, J. The defendant contends, first, that no actionable negligence was proved; and second, that the in-

jury was the result of unavoidable accident. The plaintiff contends, first, that the defendant was negligent in failing to protect the throat of the plaintiff by failing to place a sponge or packing in plaintiff's throat before he operated upon each tooth; and second, that he was negligent in failing to observe the filling, to discover that it was missing, when he extracted the tooth, and in failing to make search for the missing part.

As regards the first claim of the plaintiff, a careful reading of the record convinces us that Dr. Hickey did all that any reputable practitioner of good standing in the vicinity or locality does in that respect, and more than some of the practitioners do, so that a finding of negligence predicated upon a failure to properly guard the throat cannot be sustained.

As to whether or not the finding of the jury that he was negligent in failing to discover the presence of the filling is sustained by the evidence we are not agreed, but, assuming that he was negligent in that respect, we are of the opinion that there is no evidence that such failure was the proximate cause of the injury sustained by the plaintiff. It appears that the entrance of particles of teeth or filling escaping from the mouth during an operation into the trachea and thence into the lung is a thing of very rare occurrence. Twelve physicians and dentists testified in this case. Six of them had been engaged in extracting teeth under anesthetics for from sixteen to thirty-three years, and others had had a wide experience. Some had performed similar operations as many as four or five hundred times, and an injury such as the plaintiff suffered in this case had not occurred in the whole range of their experience. The evidence in this case tends to show that accidents of this type are of very rare occurrence. It is further established that in spite of all precautions it may occur, as the opening to the throat cannot be effectually closed without cutting off the patient's breath, and of course, if long con-

tinued, causing unfavorable results. It is not an infrequent thing for a dentist to perform the operation unaided. There is nothing in the case which tends to show that had Dr. Hickey discovered the filling at the time of his first or second examination a different result would have been arrived at, a fact that must be proved and not left to conjecture if defendant is to be held liable. There is evidence of one dentist who testified that if he missed a filling he would stop the operation and summon a physician. He is practically alone in this position, the testimony being to the effect that it is not unusual for pieces of broken tooth or filling to escape into the throat and then into the esophagus and into the stomach. They pass on through the alimentary canal or are vomited up, as the case may be. It is not ordinarily a cause of any concern.

It is found inferentially by the trial court that Dr. Hickey did all that was necessary to comply with the standard of care as established by the expert testimony upon the trial. The plaintiff attempted to meet this situation by testimony by experts that, had Dr. Hickey known of the existence or location of the filling, he would have discovered on examining the tooth which held it, after that tooth was pulled, that the filling had been dislodged, whereupon it would become his duty to institute a search for it. There is no evidence, however, from which it can be inferred that, had the filling been missed, any search, however diligent, would have discovered it, or the accident been avoided, inasmuch as everything known to dental science was done to prevent the filling from going into the throat in any event. All that could be done under any circumstances was to do what was done, to protect the throat during the operation and swabbing out and cleaning out the mouth as the operation progressed. That teeth, especially those in poor condition (and plaintiff's teeth were that), fracture; that no matter what precautions are taken it is not possible under such circumstances to determine accurately whether all fragments are

removed; and that in spite of such precautions fragments of tooth or teeth themselves may be thrown back into the throat, appears from the expert testimony offered on behalf of plaintiff.

While there is a conflict in the expert evidence as to the manner in which the operation should have been performed and the degree of care which Dr. Hickey should have exercised, we do not for that reason feel bound, even though the jury has found a verdict based thereon. Where the verdict of a jury based upon opinion evidence does not commend itself to the court as reasonable or sound, it will not be given the weight which is accorded to a verdict where it rests upon inferences drawn from facts as distinguished from mere opinion. *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518; *Krawiecki v. Kieckhefer Box Co.* 151 Wis. 176, 138 N. W. 710.

The trial court was of the opinion that whether Dr. Hickey was negligent in permitting the escape of the particles of tooth and filling into the plaintiff's throat was not to be determined in accordance with the practice as established by the testimony of witnesses in the vicinity in which Dr. Hickey practiced, but was a matter which might be determined from common knowledge. He regarded the escape of the foreign matter into the plaintiff's throat as a physical fact, about which any ordinarily intelligent individual can form as correct a judgment as could the experts. In this we think the trial court was in error. The whole operation and the degree of care to be exercised by the operator is a matter peculiarly within the knowledge of those who are skilled in dentistry, and while the prevention of accidents may seem simple to the outsider, it may as a matter of fact be quite otherwise in actual practice. It is easy for one to be wise in fields of activity other than those with which he is most familiar, and to erect standards of care that may be wholly inapplicable. What constitutes ordinary care in a case such as this is to be determined by the testimony of

those who know what it is and not as a matter of common knowledge. *McGraw v. Kerr,* 23 Colo. App. 163, 128 Pac. 870.

In our view, assuming that Dr. Hickey was guilty of a want of ordinary care in failing to discover the filling in question before proceeding with the operation, there is nothing in the evidence to substantiate the finding that his failure to make the discovery either of the filling or of the particle of tooth in any way contributed to the plaintiff's injury. According to the practically undisputed evidence, nothing more could have been done to prevent the escape of the pieces into the plaintiff's throat than was done in the present case. The accident was a very unfortunate one for the plaintiff, resulting in a serious injury, but it does not appear that such injury was caused by the failure of Dr. Hickey to observe the filling. It was rather the result of unavoidable accident, for which he is not liable.

By the Court.—Judgment reversed.

A motion for a rehearing was denied, with $25 costs, on July 3, 1920.

BAYFIELD COUNTY, Appellant, vs. OGREN and another, Respondents.

April 6—July 3, 1920.

Contracts: Construction of highway: Work completed by county after contractor's default: Pro rata recovery for work done: Liability of contractor: Measure of damages: Actual cost to county not reasonable cost of completing work.

1. A contract with a county for road work at a specified price per cubic yard which provided that, in case the contractor failed to complete the work by a designated time, the county might complete it at the expense of the contractor, is divisible and not entire, so that the contractor can recover for the work done by him before the default.

2. Where the contract authorized the county to complete the contract in the event of failure of the contractor and made the contractor and his sureties liable for the expense of such completion in excess of the contract price, the county can recover from the contractor the amount it expended if it acted with due diligence, without negligence, and in good faith, though such amount was greater than the jury found to be the reasonable value of the completion of the contract.
3. The testimony of experts as to the reasonable cost of completing the work is not always a satisfactory substitute for actual experience, and in the absence of negligence or fraud ought not to be admissible.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Reversed.*

The defendant *Ogren* made a written contract with the plaintiff in April, 1917, to make a dirt fill for the construction of a certain public highway, at an agreed compensation of seventy cents per cubic yard. Defendant *Ogren* agreed to commence work by April 20th and complete the work by July 15th. The defendant *National Surety Company* gave its bond for the faithful performance of the contract by the defendant *Ogren.* It is not necessary to set out the contract in full. The defendant *Ogren* agreed to do all the work of the improvement according to the specifications, and to furnish all labor, tools, machinery, and material necessary therefor, except as otherwise provided. The work was to be done under the direction and supervision of the highway commissioner of *Bayfield County,* referred to in the contract as the commissioner. The contract, among other things, provided:

"If at any time the work under contract should be abandoned, or if at any time the commissioner should judge that said work, or any part thereof, is unnecessarily delayed, or that the contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, then, in that case, the commissioner shall notify said contractor to discontinue all work under this contract. Said commissioner may employ other parties to complete the work in such manner as he may decide, and use such ma-

terial as may have been delivered upon the aforesaid work, and, if necessary, procure other material for its completion, and charge the expense of said labor and material to the contractor, which expense shall be deducted from any money due him under this contract. In case these expenses shall exceed the sum which would have been payable under this contract if the same had been completed by the contractor, he or his sureties shall pay the amount of the excess to *Bayfield County,* on notice from the commissioner."

On July 15, 1917, the defendant *Ogren* had moved about 2,000 cubic yards of earth, the total amount to be moved under the contract being 14,000 cubic yards. After proper notice the work was taken over and the contract was relet to one H. F. Balch & Company at ninety-two cents a cubic yard. Under this contract Balch & Company moved 12,531 cubic yards, and this action was brought to recover the difference between the price paid Balch & Company and the contract price, or twenty-two cents a cubic yard, amounting to $2,756.82. The defendant *Ogren,* by way of counterclaim, alleged that he was entitled to $1,484, the contract price at seventy cents per yard, for moving 2,120 cubic yards of dirt. The defendant *Ogren* also alleged that he was prevented from completing the contract by the unwarranted acts of the plaintiff, and demanded damages in the sum of $4,560. There was a special verdict, one question being submitted to the jury, which was, "What was the reasonable cost per yard, on or about June 28, 1917, of removing the 12,531 cubic yards of earth necessary to complete the *Ogren* contract?" And the answer was "Seventy cents." There were proper motions upon this verdict reserving the questions raised here, and the court directed judgment in favor of the defendant *Ogren* against the plaintiff for $1,484, with interest from the 15th day of July, 1917. From this judgment the plaintiff appeals.

For the appellant there was a brief by *Walsh & Morris* of Washburn, and oral argument by *Charles F. Morris.*

A. W. MacLeod of Washburn, for the respondents.

The following opinion was filed May 4, 1920:

ROSENBERRY, J. It is claimed on behalf of the plaintiff that the contract is an entire one, and that the defendant *Ogren,* being in default under his contract, may not recover for the performance *pro rata.* This contention cannot be sustained. Where a contract contains a provision such as is found in this contract, authorizing the owner in the event of default to take possession of the work and complete it at the expense of the contractor, the contract is by its terms divisible and not entire. *Arndt v. Keller,* 96 Wis. 274, 71 N. W. 651.

The principal question in the case is well set out by the trial judge in his opinion. He says:

"Defendants' contention upon the trial was that on taking over the work plaintiff could, under the contract, only proceed to complete the improvement of the road by day labor; that it had no authority to let the completion of the improvement on contract; and that, at any rate, no matter how the work was done, *it was incumbent upon the plaintiff to show that the price paid for it was reasonable and necessary.* Plaintiff, on the other hand, insists that it had a right to have the work completed in any way it saw fit, either by day labor or contract, and without advertising for bids or making any special effort to secure bids, provided it proceeded in good faith."

As will be seen by the statement of facts, the trial court adopted the contention of the defendant *Ogren* that the burden was upon the plaintiff to show what the reasonable price of completing the contract was, and upon that price, found by the jury, judgment went in favor of the defendant *Ogren.* The court found that the plaintiff was fully justified in taking over the work.

The precise question raised in this case has not, so far as we are able to ascertain, been before this court for consideration. Aspects of it were considered in *Arndt v.*

Keller, 96 Wis. 274, 71 N. W. 651; *Foeller v. Heintz,* 137 Wis. 169, 118 N. W. 543, and some other cases, particularly *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356, and cases there cited. From language contained in these cases the trial court may well have inferred authority for the ruling which it made, although we are of the opinion that the cases referred to do not parallel the situation presented by this record, and the question presented here was not raised in any of the cases to which reference has been made. We think the rule adopted by some courts (9 Corp. Jur. 815, note 67), that where a contract provides that in the event of a breach of the contract by the contractor the owner may take possession and complete the same at the expense of the contractor, and that the amount of recovery is limited to the reasonable cost of doing the work without reference to the actual expense thereof, works an injustice to the owner. It is a matter of common knowledge that it is oftentimes difficult to procure labor to complete a half-finished job. Seasonal obstacles oftentimes present themselves. Difficulty in procuring material and competent workmen often renders the completion of the task much more expensive than the doing of the same amount of work would have been under a continuous operation. The owner, by the default of the contractor, is compelled to deal with a concrete question. If the contractor does not wish to place the matter in the hands of the owner he should complete his contract. It is much more just and reasonable, under a contract authorizing the owner to complete the work at the expense of the contractor, to permit the owner to recover the actual cost of completing the contract, where the owner has acted diligently and in good faith and there is no evidence of fraud or negligence. There is no reason for applying the ordinary rule of reasonable cost, for all the work is done under the terms of the contract. Where the contract, as in this case, provides that the *expense* shall be charged to the contractor, in the absence of negligence or fraud the theo-

retical cost of doing the work is an immaterial matter. An owner may not, of course, under such circumstances, proceed to make the completion of the work as expensive as possible, but where he does proceed in good faith and with diligence to have the work completed, he ought not to be subjected to the hazards of litigation to ascertain the amount due him from the contractor. The employment of experts in cases of this kind is not always a satisfactory substitute for actual experience, and the opinion of experts ought not to be admissible where there is no evidence of negligence or fraud. *Zimmermann v. Jourgensen,* 14 N. Y. Supp. 548; *S. C.* 70 Hun, 222, 24 N. Y. Supp. 170; affirmed, memorandum opinion, 144 N. Y. 656, 39 N. E. 859. See 9 Corp. Jur. p. 814, § 153, and cases cited.

Our attention has not been called to any evidence which in the slightest degree impeaches the good faith, or shows any negligence on its part, of the plaintiff in this action. The plaintiff is therefore entitled to recover the amount demanded in the complaint, less the amount due the defendant on his counterclaim for the yardage moved.

By the Court.—Judgment reversed, with directions to the trial court to enter judgment in accordance with this opinion.

A motion for a rehearing was denied, with $25 costs, on July 3, 1920.

ESTATE OF SPOONER.

April 7—July 3, 1920.

Descent and distribution: Ancestral estate of unmarried minor child: Property derived from grandparent: Descent: Statutes: Construction.

1. Sub. (5), sec. 2270, Stats., providing that, on the death of a minor unmarried, property descending to him from a deceased parent will go to the other children of the same parent, and not to a parent as provided by sub. (2), sec. 2270, is in the

nature of an exception to the general purpose of the statutes of descent, which is that intestate estate shall, where no other provision is made, descend to the next of kin of the deceased irrespective of whether or not it is ancestral estate.

2. Sec. 4971, Stats., requiring that in the construction of statutes all words and phrases shall be construed and understood according to the common and approved usage of the language, does not prevent the court from enlarging or restricting the meaning of a particular word or words where that becomes necessary in order to give effect to a plainly declared legislative purpose.

3. It is not the office of a court to extend a statute by construction where there is no express legislative intention to guide it.

4. The words "parent" and "child" in sub. (5), sec. 2270, providing that on the death of a minor unmarried child his property should pass to the children of the parent from whom the child inherited or received it by testamentary gift, should not be construed to include grandparents or grandchildren, even though it results in devolving the estate on a stranger to the blood of the person from whom the estate descended.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Heirship. Warren Gilbert, a resident of Columbia county, Wisconsin, died intestate August 28, 1914. He left surviving him as his only heirs at law the following: Three sons: A. C. Gilbert, Chas. L. Gilbert, and E. A. Gilbert; Florence L. Gilbert and Leila Dalton, daughters of a deceased son, James W. Gilbert; R. H. Gilbert, U. S. G. Gilbert, Chester Arthur Gilbert, Albert Gilbert, grandsons, children of a deceased son, George H. Gilbert. George H. Gilbert also had a daughter, Cora, who was married to one Spooner. Said daughter Cora predeceased Warren Gilbert and left surviving one daughter, Sara Spooner, a great-granddaughter. George H. Gilbert also had a daughter, Mary, who married one Spooner. She also predeceased Warren Gilbert, leaving three children: *Leah,* Frank Elliott, and *Edwin.* Frank Elliott Spooner was therefore one of the heirs of the estate of said Warren Gilbert. He died October 16, 1917, and was at the time of his death entitled

to receive a one-ninetieth part of the estate of Warren Gilbert. Said Frank Elliott Spooner at the time of his death was a resident of the city of Columbus, in the state of North Dakota, was a minor, unmarried, and childless. Said Frank Elliott Spooner left surviving him his father, *George C. Spooner,* also a resident of the city of Columbus, North Dakota. His mother, as has been stated, was dead, and he left a sister, *Leah,* and a brother, *Edwin,* both of whom are minors.

The trial court held that the brother and sister of Elliott Spooner took that part of the estate of Warren Gilbert which otherwise would have belonged to Frank Elliott Spooner. Judgment went accordingly, from which the administrator of the estate of Frank Elliott Spooner appeals.

For the appellants there were briefs by *David Bogue* of Portage, attorney for *Thomas H. Sanderson,* administrator, and by *James J. McDonald* of Portage and *F. E. Heckel* of Bowbells, North Dakota, attorneys for *George C. Spooner;* and the cause was argued orally by *Mr. Bogue* and *Mr. McDonald.*

Harlan B. Rogers of Portage, guardian *ad litem* for *Leah Spooner* and *Edwin Spooner,* minors.

The following opinion was filed May 4, 1920:

ROSENBERRY, J. The determination of the question involved requires a construction of sub. (2) and (5), sec. 2270, Stats.

Sec. 2270. "When any person shall die seized of any lands, tenements or hereditaments or any right thereto or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, except as provided in the next section, in the manner following: . . .

"(2) If he shall leave no lawful issue, to his widow; if he shall leave no such issue or widow, to his parents, if liv-

ing, and if either shall not be living, the survivor shall inherit his said estate. . . ."

"(5) If any person shall die leaving several children or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, not having been married, all the estate that came to the deceased child by inheritance or by testamentary gift from such deceased parent and all personal property which belongs to such deceased child by reason of distribution under subdivision 6 of section 3935 shall descend and be distributed in equal shares to the other children of the same parent and to the issue of any such other children who shall have died, by right of representation."

The trial court was of the opinion that the words *child* and *children* in sub. (5) should be construed to include *grandchild* and *grandchildren,* and the word *parent* to include *grandparent* and *great-grandparent,* in order to effect the purpose of the statute, which is to devolve the estate of the minor child upon its next of kin of the same blood as the parent from whom the estate came, and that therefore the brother and sister of Frank Elliott Spooner inherited, not from him, but from the ancestor (*Perkins v. Simonds,* 28 Wis. 90); and that the appointment of an administrator of the estate of Frank Elliott Spooner was proper only as to that part of his estate which had been assigned to him prior to his death.

On behalf of the administrator of the estate of Frank Elliott Spooner it is contended that sub. (5) is in the nature of an exception to sub. (2); that sub. (5) should not, therefore, be extended by construction; that the mother of Frank Elliott Spooner having predeceased him, he did not inherit the estate from the mother, but inherited it from Warren Gilbert, the great-grandfather, through his mother; that an inheritance by and through a parent is not an inheritance from a parent; that sub. (5) does not apply to the facts in this case, and the property should descend in accord-

ance with sub. (2), and therefore belongs to the father of Frank Elliott Spooner.

In *Perkins v. Simonds,* 28 Wis. 90, and *Wiesner v. Zaun,* 39 Wis. 188, this court had under consideration the question whether, where a minor child dies unmarried without issue, having an interest in land which descended to him from a parent, the brother and sisters of the deceased child take by inheritance from the deceased child or from the parent from whom the estate was derived.

In *Sheffield v. Lovering,* 12 Mass. 490, and *Nash v. Cutler,* 16 Pick. 491, the supreme court of the state of Massachusetts, from which this provision of our statutes was copied, had construed the statute, and this court felt bound by the construction placed upon the statute by the court of Massachusetts prior to its adoption here. Following the decisions referred to, this court held that the brothers and sisters of a deceased child take from the parent and not from the deceased child, and further held that it was the purpose of this provision to devolve the estate of a deceased minor, unmarried and without issue, in the manner that it would have descended if the child had died in the lifetime of the parent from whom the estate was derived.

This is in the nature of an exception to the general purpose of our statutes of descent, which is that intestate estate shall, where no other provision is made, descend to the next of kin of the deceased, irrespective of whether or not it is ancestral estate. *Estate of Kirkendall,* 43 Wis. 167.

It is to be noted that in the Massachusetts cases, as in *Perkins v. Simonds* and *Wiesner v. Zaun,* the court was dealing with a situation to which the statute was by its terms applicable. The question of the applicability of the statute was not before the court in any of the cases referred to, but rather its effect in a case where there was no doubt as to its applicability.

Sub. (2), sec. 2270, states the general rule as to the

descent of property where the intestate dies without issue. Sub. (5) is in the nature of an exception to the provisions of sub. (2), and provides a different rule which applies under the circumstances therein set out. *Goodrich v. Adams,* 138 Mass. 552 (1884).

The purpose of sub. (5) is an inference drawn from the effect of its operation where applicable, and not one expressly declared. We are urged further to extend the statute by construction so that it will apply not only to cases of descent from parent to child, but to descents from more remote ancestors to issue more remote than a child, for it is plain that Warren Gilbert does not answer the calls of either of the provisions of sub. (5). *Stitt v. Bush,* 22 Oreg. 59, 29 Pac. 737.

Sub. (1), sec. 4971, Stats., requires that "All words and phrases shall be construed and understood according to the common and approved usage of the language." This does not prevent the court from enlarging or restricting the meaning of a particular word or words where that becomes necessary in order to give effect to a plainly declared legislative purpose. It is not the office of a court to extend a statute by construction where there is no express legislative intention to guide it. *Gardner v. Collins,* 2 Pet. 58. Were we to adopt the construction urged upon us by the respondent, it would result not only in enlarging the meaning of the words of the statute, but would enlarge its scope so as to include within it cases not within its terms, and this contrary to the general purpose of our statutes of descent as stated in *Estate of Kirkendall, supra.*

The language of the statute is, "All the estate that came to the deceased child by inheritance or by testamentary gift from such deceased parent." The language is plain and unambiguous. The difficulties which might and very likely would present themselves in many cases, if the word *parent* were construed to mean *grandparent* or *great-grandparent,*

undoubtedly caused the legislature to refrain from the use of the word *ancestor* instead of the word *parent,* as is the case in some earlier statutes. The descent of many estates might be involved in almost inextricable difficulties. If words are to be understood and construed in accordance with their common and approved usage, descent from a parent to a child cannot be construed to mean a descent from a remote ancestor through the parent and not from the parent. *Gardner v. Collins,* 2 Pet. 58.

We are not disposed to extend the statute by construction, even though, as we construe it, it results in devolving an estate upon a stranger to the blood of the person from whom the estate descended, and must hold that the statute is applicable only in cases which are within the language of the statute by its terms. This accords with the principle by which the statutes of descent have been construed by this court (*Estate of Kirkendall,* 43 Wis. 167), and is in accord with the great weight of authority in other jurisdictions. *Goodrich v. Adams,* 138 Mass. 552; *Clark v. Shailer,* 46 Conn. 119; *Gardner v. Collins,* 2 Pet. 58; *Sedgwick v. Minot,* 6 Allen (Mass.) 171; *Duncan v. Lifferty's Adm'r,* 6 J. J. Marsh. (Ky.) 47; *Turner v. Patterson,* 5 Dana (Ky.) 292; *Brewster v. Mack,* 69 N. H. 52, 44 Atl. 811.

Sub. (5) not being applicable, the interest of Frank Elliott Spooner in the estate of his grandfather descends as intestate property from him, and an administrator of his estate was therefore properly appointed.

The conclusion at which we have arrived renders a discussion of other questions raised unnecessary.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

A motion for a rehearing was denied, without costs, on July 3, 1920.

STATE EX REL. LOEHR and another, Appellants, vs. HANSON and others, Town Supervisors, Respondents.

April 9—July 3, 1920.

Highways: Petition to lay out: Action by town supervisors: Refusal by failure to act for sixty days: Final action not required.

1. The minutes of a town board reciting that the board met at a certain time and place to examine the location for a highway, the petition for which had been filed, and that a named party had agreed to make the road passable for a certain distance, and that the board agreed to act upon the petition, are *held* not to show action on the petition within sixty days from its filing, and hence there was a refusal to act on the petition under sec. 1276, Stats.
2. Under said sec. 1276, providing that if town supervisors fail to act on a petition for the laying out of a highway within sixty days after the filing of the petition they shall be deemed to have refused the petition, final action within such time is not necessary, it being sufficient that any action required by the statute in response to the filing of the application was taken.
3. Official action, within the meaning of sec. 1276, contemplates the performance of some of those legal duties resulting from the filing of the petition.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Mandamus to compel the defendant town board to lay out a highway. An application for laying out a highway was filed with the town clerk on the 8th day of September, 1916. The town board met on the 18th day of December, 1916, pursuant to a notice of such meeting given on the 5th day of December, 1916, to decide upon said application. Successive adjournments were taken until the 27th day of January, 1917, when the application was refused. Upon an appeal from such order to the county judge, commissioners were appointed under sec. 1276, Stats., and they reversed the action of the town board. This action is brought

to compel the town board to lay out the highway pursuant to the order of the commissioners. The circuit court refused the peremptory writ, and relators appealed.

The cause was submitted for the appellants on the brief of *F. J. Walthers* of Milwaukee, and for the respondents on that of *Storms, Foley & Beck,* attorneys, and *William W. Storms,* of counsel, all of Racine.

The following opinion was filed May 4, 1920:

OWEN, J. This action was here on a former appeal (168 Wis. 497, 170 N. W. 725) where a more detailed statement of facts will be found. The issues were there presented upon a demurrer to the return to the alternative writ, and it was held that the failure of the town board to act upon the petition within sixty days from the date of its filing with the town clerk constituted a refusal to lay out the highway pursuant to the provisions of sec. 1276 of the Statutes. Upon the remission of the case to the circuit court the relators filed an answer to the return of the town board in which it was alleged that the town board had taken action upon the petition within sixty days after the filing thereof, which action consisted of (a) the making out and signing of the notice for the meeting of December 18th on the 5th day of September, and (b) action of the town board as evidenced by the following minutes taken from the official records of the proceedings of the town board kept by the town clerk:

"Town board of the town of Norway composed of *Albert Hanson,* chairman, *B. J. Bendickson,* and *J. W. Goetz,* and J. A. Jacobson, clerk, met at *Matt Scharel's* in section 16, town of Norway, on October 26, 1916, for the purpose of examining the section line between sections 16 and 17, the petition for a highway on said section line having been filed with the town clerk. *Matt Scharel* agreed to make the road passable from the road running east and west along the south shore of Wind Lake and south to the quarter section

line. They examined the section line and agreed to act upon the petition."

The trial court found upon sufficient evidence that the notice for the meeting of December 18th was made out December 5th, and not on September 5th, so that the only question here is, Did the action of the town board, as indicated by the minutes of the meeting above quoted, constitute action upon the application within the meaning of sec. 1276, Stats., so that there was not a refusal to lay out the highway under the provisions of that section? We do not think it constituted action upon the petition. When an application for the laying out of a highway is filed with the town clerk the statute prescribes the duties of the town board with reference thereto. An action on their part, within the meaning of sec. 1276, must be the performance of some of those legal duties resulting from the filing of the petition. The minutes quoted do not evidence that kind of action, and our conclusion is that the allegations of the answer made to the return of the town board do not disclose action on the petition within sixty days from the date of its filing.

The decision of the trial court was based on the assumption that the action contemplated by sec. 1267, Stats., meant final action upon the application, and that even though preliminary action had been taken by the town board, yet, if final action had not been taken within sixty days, the application was to be deemed to have been refused under the provisions of sec. 1267. We are satisfied that this is not a correct construction of the statute. A consideration of the statutory procedure for laying out a highway persuades us that the legislature did not intend to require final action within sixty days from the date of the filing of the application. The notice of the time and place at which they will meet and decide upon such application must be posted up at least ten days before the time of such meeting. Sec.

1267. They may adjourn from time to time not exceeding in all thirty days from the time of first meeting. Sec. 1268. They have ten days from the date of the adjourned meeting for filing their order with the town clerk. Sec. 1269. This covers a period of fifty days. Before they can act upon the application they must be satisfied that the notices have been given as required by law. If not so satisfied, new notices should be served. *State ex rel. Loehr v. Hanson,* 168 Wis. 497, 170 N. W. 725. Under such circumstances at least ten days' extra time is consumed. If the legislature intended final action to be taken within sixty days, it calls for very prompt if not immediate action upon the filing of the application to provide for these contingencies. That such was not the legislative intent is indicated, too, by the language of sec. 1267 requiring the supervisors to make out a notice "fixing therein a time and place at which they will meet and decide [not act] upon such application." It is our opinion, therefore, that the failure of the town board shall be deemed a refusal to lay out the highway only when the supervisors fail to take any action required by statute in response to the filing of the application.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on July 3, 1920.

HAMMER and others, Respondents, vs. CASH and others, Appellants.

June 3—July 3, 1920.

Corporations: Increase of capital stock: Effect of amendment of articles: Stockholder's right to pro rata share in new stock issued: Stock issued by officers without authority of corporation: Validity: How determined: Action in equity: Jurisdiction of court: Removal of officer elected by vote of invalid shares.

1. Upon an increase of the capital stock of a corporation a stockholder is entitled to maintain his proportionate voice and influence in the corporation, and for that reason must be given an opportunity to purchase a proportionate amount of the new shares before they can be offered to outsiders.
2. An amendment of the articles of a corporation increasing the amount of its authorized capital stock, merely authorizes and empowers the corporation to issue increased stock in such amounts and at such times as the corporation may determine; but there is no obligation to issue it.
3. Where the articles of incorporation were amended so as to authorize an increase in the capital stock of a railroad company for the purpose of building an extension, and the resolution authorizing the increase provided that stock not necessary to be sold should be held in the treasury of the corporation, and neither stockholders nor directors had authorized the issue of any part of the increase, a stockholder is not entitled, by virtue of the amendment, to purchase a proportionate number of new shares; and where the extension was abandoned, an issue of a portion of said stock to certain stockholders, made by the president and secretary without the knowledge or authorization of the directors, was unlawful.
4. An action in equity is necessary to determine the validity of an issue of corporate stock.
5. Where a court of equity had jurisdiction of a suit wherein the validity of an issue of stock was attacked, it may, on canceling the stock, remove officers and directors elected by the voting of such illegal shares, without compelling a second action by *quo warranto,* a court of equity having jurisdiction to determine the right to an office and to remove or enjoin an incumbent who is not entitled thereto, when it has jurisdiction on other grounds.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is a stockholders' action for the cancellation of stock alleged to have been fraudulently issued by certain of the officers of the *Hillsboro & Northeastern Railway Company,* and to declare void the election of directors of said corporation on the 10th day of December, 1918.

The *Hillsboro & Northeastern Railway Company* was organized as a Wisconsin railway corporation in 1901, with a capital stock of $50,000, consisting of 500 shares of the par value of $100 each. In November, 1910, the articles of incorporation were amended so as to authorize the issuance of $50,000 of additional stock. Thirty-one thousand seven hundred dollars of this increase was issued subsequent to the passage of ch. 593, Laws 1911, without securing the consent of or authority from the railroad commission.

November 13, 1915, the stockholders of the said railroad company adopted a resolution further increasing the capital stock of the said company in the sum of $150,000. A certified copy of this resolution, with the certificate of the president and secretary of the company that it was adopted at a special meeting of the directors of said company, was on the 28th day of December, 1915, duly filed in the office of the secretary of state. Under date of January 21, 1916, the railroad commission authorized the company to issue 2,000 shares of stock of the par value of $100 each, making a total issue of $200,000, $31,700 of which was to be exchanged share for share for an equal amount of void stock then outstanding and the remaining $168,300 to be sold for money at not less than the par value thereof, the proceeds to be applied in defraying in part the cost of the construction of an extension of the company's line. Prior to December 11, 1917, no part of this stock had been issued except the $31,700 thereof in exchange for the stock which had been issued on the prior $50,000 increase without authority from the railroad commission, and on that date the stock then

issued and outstanding was owned as follows: *W. H. H. Cash,* 356 shares; the estate of Edward Hammer, 222 shares; F. I. Pinch, 167 shares; *Gus Weinstein,* 51 shares; C. J. Hausman, 16 shares; *John A. Cash,* 5 shares. On said 11th day of December, 1917, *W. H. H. Cash, E. J. Hammer* as executor of the estate of Edward Hammer, deceased, F. I. Pinch, *Gus Weinstein,* and *J. A. Cash* were elected directors. *W. H. H. Cash* was elected president and *J. A. Cash* secretary and treasurer. Controversies had arisen among the stockholders and they had divided into what may be denominated the Cash and Hammer factions. Holdings of stock and the officers of said company continued as on that date until December 10, 1918, the day of the annual meeting of the stockholders according to the by-laws of said corporation. As the stock was then held, it appeared that *Hammer* controlled the stockholders' meeting and would dictate the election of directors. In order to secure control of a majority of the stock, *W. H. H. Cash* as president and *J. A. Cash* as secretary and treasurer of said company, on the 10th day of December, 1918, issued to the defendant *W. H. H. Cash* 100 shares of the unissued stock of said company, taking in payment therefor a promissory note at par for $10,000, payable on demand, and they also issued to *C. F. Cash* one share of the unissued stock of said company.

The issue of said stock to said *W. H. H. Cash* and his son *C. F. Cash* was made without any knowledge or consultation with any of the directors or officers of said corporation and without any authorization by the stockholders or directors of said company and without any intimation that any of said unissued stock should be sold or offered for sale.

At the annual stockholders' meeting held on said 10th day of December, 1918, said *W. H. H. Cash* and his son *C. F. Cash* voted the said 101 shares of stock against the protest of the other faction of the stockholders thereof, and elected

said *W. H. H. Cash* and his sons *J. A.* and *C. F. Cash* as directors of said company, thereby obtaining for said *W. H. H. Cash* control of the electorate of said company.

On the 11th day of December, 1918, the said *W. H. H. Cash* and his son *J. A. Cash,* without the knowledge or consent of any of the other officers or stockholders of said company, and without any authorization therefor by the stockholders or directors of said company, further issued of the treasury stock of said company to said *W. H. H. Cash* $1,400, *J. A. Cash* $100, A. B. Cash $100, W. N. Cash $100, and W. L. Cash $100.

The trial court entered judgment declaring void the issuance of the stock to *W. H. H. Cash* and his sons on the 10th and 11th days of December, 1918, canceling and setting the same aside, and declaring void the election of directors on the 10th day of December, 1918, and restoring the management of the affairs of the company to the directors elected at the annual stockholders' meeting held in December, 1917. From the judgment so entered the defendants bring this appeal.

For the appellants there was a brief by *J. Henry Bennett* of Viroqua, attorney, and a reply brief by *C. H. Van Alstine* of Milwaukee, of counsel, and oral argument by *Mr. Van Alstine.*

For the respondents there was a brief by *Olin, Butler, Stebbins & Stroud* of Madison, and oral argument by *Byron H. Stebbins* of Madison and *E. J. Hammer* of Hillsboro.

OWEN, J. Appellants attempt to vindicate their title to the stock issued to them in December, 1918, upon the ground that they had the absolute right to purchase the amount of the increased stock provided for by the resolution of November 13, 1915, proportionate to the amount of stock held by them prior to the adoption of said resolution. It is firmly established as the law of this state by *Luther v. C. J.*

Luther Co. 118 Wis. 112, 94 N. W. 69, and *Dunn v. Acme A. & G. Co.* 168 Wis. 128, 169 N. W. 297, that upon an increase of the capital stock of a corporation a stockholder is entitled to retain and maintain his relative and proportionate voice and influence in the control and management of the affairs of the company by purchasing an amount of the increase of the capital stock proportionate to his then holdings in the corporation, and before the stock can be sold to outsiders each stockholder must be given an opportunity to avail himself of this right. This principle is not questioned by respondents, but they insist that this right does not accrue until the corporation concludes to issue the increased stock, and that then it only applies to so much of the stock as it is proposed to issue; and whether this position is correct is the principal question to be determined.

The amendment of the articles of the corporation increasing its capital stock merely authorizes and empowers the corporation to issue increased stock in such amounts and at such times as may thereafter be determined by proper corporate authority. It is under no obligation to issue the stock merely because it has acquired power and authority so to do. Articles of incorporation are frequently so amended as to increase the amount of the authorized capital stock of a company in such amounts as will meet its contemplated requirements for some time in the future, without any thought that the whole amount of such increase shall at once be issued. May a stockholder, immediately upon an amendment of such character becoming effective, demand that his proportionate share of the entire amount of such increase be issued to him? Bearing in mind that this right is accorded to the stockholder in order that he may maintain his relative voice in the affairs of the corporation, it is manifest that the reason upon which the principle is founded is fully satisfied if he is permitted to purchase his relative proportion of such amount of the stock as is authorized to issue. To illustrate, a corporation may so amend its articles

as to provide for an increase of its capital stock in the sum of $100,000. From the mere amendment of the articles, however, it does not follow that the entire amount of such increase is to be issued. Whether any part of such increase is to be issued, and when, and for what amount, rests with the corporation after it has acquired the authority so to do by the amendment to its articles. When the corporation decides to issue $50,000 of the authorized increase, the right of the stockholder is fully protected by permitting him to purchase his proportionate share of such $50,000 proposed to be issued, and this we think is as far as the rule extends.

In this case the corporation had done nothing more than to amend its articles authorizing an increase in its capital stock. Neither the stockholders nor the board of directors had taken action authorizing the issue of any part of such increase. Moreover, the resolution authorizing the increase of the capital stock recites that it is necessary to raise the money for the purpose of constructing a proposed extension of the railroad, and specifically provides "that said stock and bonds when issued be disposed of only as may be necessary to procure funds for the construction and equipment of said extension, and should it be found not to be necessary to use the entire issue hereby provided for, then the balance shall be held in the treasury of the company to be disposed of in the future as may be determined." It is without dispute that the building of the extension was abandoned when war was declared, and there is no pretense on the part of the defendants that the money accruing from the sale of this stock was necessary for the purpose of constructing the extension. Under the circumstances, the sale of the stock was not only unauthorized, but was prohibited by the fundamental governing body of the corporation, the stockholders themselves. There was therefore no power or authority on the part of the president and secretary of the company to sell the stock in question to themselves or to any other per-

son, and its issuance was void. The judgment of the lower court canceling said stock was plainly right.

It is further claimed by appellants that the court had no power to determine the right and title of the directors, elected at the 1918 meeting, to their offices, as the right of one to an office in a private corporation must be tested by *quo warranto*. The right of the directors elected at the 1918 meeting to their offices depended upon the validity of the stock issued to the defendants on December 10, 1918. If the stock were legally issued the title to their offices could not be questioned. In order to determine the validity of their offices, therefore, it was first necessary to establish the validity of the stock so issued. This could be done only in a proceeding in equity. Appellants' contention amounts to this: It was first necessary to bring an action in equity to determine the validity of the stock. After the invalidity thereof had been determined and the stock canceled, an independent and subsequent action in *quo warranto* was necessary in order to oust the directors, so illegally elected, from office. This position is not tenable.

"A court of equity has jurisdiction to determine the right to an office, and to remove or enjoin an incumbent who is not entitled thereto, when it has jurisdiction of the suit on other grounds, and such relief is merely incidental to the other relief sought." 3 Fletcher, Corp. § 1829. See, also, High, Injunctions (4th ed.) §§ 1235, 1315*a*.

Such relief was granted in a similar action in *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69.

By the Court.—Judgment affirmed.

MONTAGUE, Appellant, vs. NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Respondent: T. G. MONTAGUE, interpleaded.

June 4—July 3, 1920.

Insurance: Option as to manner of payment: Revocation: Evidence: Correspondence between insurer and insured.

1. Where a life insurance policy, with the indorsements thereon, did not fully express the arrangements made by the parties when the contract was negotiated, correspondence between them was competent to show their understanding as to whether a clause in the policy had been revoked or suspended.
2. In an action on an endowment policy involving the issue of whether the proceeds of the policy were payable in a lump sum or by instalments under an option clause, the evidence is *held* to support a finding that a request for an option settlement was not revoked by a change of beneficiaries, made necessary when the insured secured a loan on the policy, and that it was in full force on insured's death after reinstatement of the original beneficiaries.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action was brought to procure the payment in a lump sum of $25,000 by the defendant company to plaintiff as beneficiary of a life insurance policy issued by the defendant company to Wallace R. Montague, father of the plaintiff. Wallace R. Montague died during the endowment period, and the only question litigated is whether the amount of the policy is payable in a lump sum or by instalments under what is designated as "Option A."

The complaint alleges, in substance, that on March 23, 1910, defendant issued a policy and insured the life of Wallace R. Montague in the sum of $25,000, payable to such beneficiaries as might thereafter be designated under the contract, if any; that on or about August 6, 1910, insured named *Wallace R. Montague, Jr.*, the plaintiff, as benefi-

ciary in the policy, and his children and a brother as contingent beneficiaries, an indorsement to that effect being entered on the policy; that at this time the insured requested that settlement be made with the beneficiary under the provisions of Option A, with the privilege of surrendering $5,000 of the proceeds of the policy after the beneficiary attained the age of forty years, and that an indorsement to this effect was also affixed to the policy; that about August 28, 1915, insured requested defendant to change the beneficiary from *Wallace R. Montague, Jr.*, the plaintiff, to the executors, administrators, or assigns of the insured, and thus revoked the appointment of the contingent beneficiaries, and that indorsement of this change of beneficiary was duly made on the policy; that on August 24, 1916, insured revoked the last designation of beneficiary under the policy and renamed the plaintiff, *Wallace R. Montague, Jr.*, as beneficiary, and at the same time designated certain contingent beneficiaries, and an indorsement to that effect was duly entered upon the policy.

The complaint further alleges that each of these requests was made in accordance with the rules and regulations of the defendant; that on February 18, 1919, while the policy was in full force and effect, and all the premiums paid, Wallace R. Montague, the insured, died, having made no other designation of beneficiary; that the defendant company has refused to pay any part of the $25,000 and other accrued amounts, for the reason, as it alleges, that the settlement of the beneficiary should be made only under the provisions of Option A, the insured having requested such settlement on or about August 8, 1910, and never having revoked said request for settlement under Option A.

The complaint also alleges that in fact the insured's request for payment under Option A had been revoked by the changing of the beneficiary or beneficiaries from *Wallace R. Montague, Jr.*, to the executors of insured, and ever since

that time has been of no effect and has been superseded by subsequent changing of beneficiary without again requesting that the settlement should be made under Option A.

Defendant contends that the indorsement of August 28, 1915, changing the beneficiary to the executors of insured, was for the sole purpose of obtaining a loan from defendant on the security of the policy and was made pursuant to advice that such change was necessary to obtain such loan; that insured at that time designedly omitted to revoke the indorsement providing for settlement under Option A, because he intended, after the loan was obtained, to again rename plaintiff and his children as beneficiaries, and that Option A should therefore again be effective. The defendant alleges that when the loan was paid and the policy redelivered to the insured he was informed that the indorsements thereon provided for settlement under Option A, that he made no objection to the policy, nor did he at any time ask for any change or modification of any of the indorsements.

A trial was had before the court. The court found that the change of beneficiary had been made in the manner described in the complaint, but found, in addition, that on August 24, 1916, the insured requested and obtained from the insurance company an indorsement upon the policy reinstating *Wallace R. Montague, Jr.*, as beneficiary and reinstating the contingent beneficiaries in identically the same manner as the indorsement of August 8, 1910; that the loan on the policy made in August, 1915, was repaid by the insured in March, 1917, and the policy redelivered to him with the indorsement thereon of August 8, 1910, directing that settlement under the policy should be made under the provisions of Option A, and that such direction was never at any time or in any manner revoked by the insured during his lifetime; that the beneficiary change made in August, 1915, for the purpose of securing a temporary loan from the insurance company, was not intended by insured as a rev-

ocation of the existing policy indorsement that settlement be made with the beneficiaries under the provisions of Option A.

As conclusions of law the court found that settlement under the provisions of Option A was merely suspended during the time the policy was payable to the insured's executors and was not revoked by the beneficiary change; that the policy is now payable under Option A; and that defendant is entitled to judgment dismissing the complaint upon the merits with costs. Judgment was entered accordingly, and from this judgment plaintiff appeals.

For the appellant there was a brief by *Winter, Morris, Esch & Holmes* of La Crosse, and oral argument by *Frank Winter.*

For the respondent there was a brief by *George Lines* and *Sam T. Swansen,* both of Milwaukee, and oral argument by *Mr. Swansen.*

SIEBECKER, J. The appellant assails findings 7 and 9 of the trial court as not supported by the evidence. The material facts of these findings are that when the policy in question was redelivered to the insured by the defendant upon payment of the loan in March, 1917, it had indorsed thereon the original indorsement of August, 1910, to the effect that settlement of the policy should be made under the provisions of Option A; that such direction had never been revoked by the insured, and that the insured and insurer by their negotiations for the loan in August, 1915, did not intend that the clause specifying that settlement of the policy was to be made under Option A should stand revoked, but that it was only suspended until the loan was paid, and that upon payment of the loan and the renaming of the former beneficiaries it was understood that settlement of the policy under Option A was to be effective. It is urged that the court erred in finding that the correspondence in May, 1917, by the local agent at the insured's re-

quest, and the company's answer thereto, shows the understanding of the parties on this point. This correspondence in itself clearly shows that the insured informed the company that he intended that his son and children were to be reinstated as beneficiaries under the same option settlement theretofore indorsed on the policy. The company expressly assented thereto by stating that the policies were payable as the insured desired and that the former designation of beneficiaries and option settlement were reinstated under date of August 24, 1916, "in accordance with insured's request at that time." The correspondence amply sustains these conclusions. It is considered that the policy with the indorsements thereon does not fully express the arrangements made by the parties when the contract was negotiated. Under such circumstances evidence of this transaction is admissible to show their understanding. This made the correspondence on the subject competent evidence for such purpose. The provision in the policy declaring that a revocation of the option settlement indorsed on the policy at the insured's request could only be changed through a written demand filed at the home office of the company, and the fact that no such written demand was made by the insured, tends to support the finding of the trial court that the option settlement was in fact not intended to be revoked when the loan was secured.

An additional and persuasive fact sustaining the court's conclusions is that when the policy was returned to the insured in March, 1917, it showed on its face that the option had at no time been canceled by his acts or by the acts of the company. Insured's retention of the policy with this written indorsement, without objection or protest, is evidence tending to show that he acquiesced in the terms of the contract as they appeared on the policy. We think the trial court properly concluded that "after he [the insured] paid the loan he received and held the policy until his death with the express direction indorsed thereon, and . . . that it must

be held that such direction was in force at the time of his death, and that settlement of the policy must be made in accordance therewith."

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. MELMS, Plaintiff, vs. YOUNG and others, Election Commissioners, Defendants.

June 4—July 3, 1920.

Counties: Uniformity of government: Nonpartisan nomination and election of county officers: Constitutionality.

1. Sec. 9, art. XIII, Const., reserves to the people of a county the right to elect county officers unless otherwise provided for in the constitution.
2. The elective franchise may be regulated to prevent corruption and secure to the elector an honest and orderly exercise of the right to cast his ballot.
3. A general law applicable to a class of counties which constitutes a departure from uniformity in county government must rest on facts and existing conditions showing it is not practicable to carry on the county government in the particular class under the law providing for the carrying on of county governments generally throughout the state.
4. Ch. 566, Laws 1919 (sec. 5.265, Stats. 1919), providing for the nonpartisan nomination and election of county officers in counties having a population of more than 250,000, is an unjustifiable departure from the uniform system of county government established by the legislature of the state, and violates sec. 23, art. IV, Const.

THIS ACTION is brought under the original jurisdiction of this court to test the constitutionality of ch. 566, Laws 1919, being sec. 5.265, Stats. 1919.

The statute provides for the nonpartisan nomination and election of county officers in counties having a population of more than 250,000. Under the law, county officers in such counties are to be nominated and elected in the same manner that such officers in other counties are nominated and elected except that the use of party designations is pro-

hibited and the names of the two candidates receiving the highest number of votes for each office are to be printed upon the official ballot at the general election. It is also provided that a separate ballot for such offices shall be provided for both the primary and general election.

Edwin W. Knappe and *Horace B. Walmsley,* both of Milwaukee, for the plaintiff.

Winfred C. Zabel, district attorney of Milwaukee county, and *William L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys, for the defendants.

In support of the constitutionality of sec. 5.265, Stats. 1919, there was a brief and also oral argument by *Lawrence Conlan* and *Charles B. Perry,* both of Milwaukee, as *amici curiæ.*

SIEBECKER, J. This is an original action in this court and the relief demanded is that the defendants, as the board of election commissioners of Milwaukee county, be restrained from enforcing the provisions of ch. 566, Laws 1919 (sec. 5.265, Stats.), in the conduct of the 1920 general election for county officers in Milwaukee county. The statute provides for nonpartisan nomination and election of county officers in counties having a population of more than 250,000. County officers in the counties to which the statute applies are to be nominated at a primary and elected at the general election as in other counties, but "all reference to party and party principles shall be eliminated from nomination papers of candidates for such offices. Such papers shall be designated nonpartisan, and shall contain no other designation whatever."

The statute provides that the two persons receiving the highest number of votes cast for candidates for a county office shall be the nominees for such office and none other shall be placed on the official ballot. The names of candidates "for county offices shall be arranged on a separate ballot at both the primary and general elections, under the

designation of the office for which they are candidates, and there shall be no party or other designation whatever placed upon such ballot. The ballots shall be so prepared that an elector may vote for any other person for any county office by writing his name upon the ballot."

All existing statutes applicable to the election of county officers, except where they are not consistent with the provisions of this statute, are to govern the nomination and election of county officers.

The question of the constitutionality of the law is raised. It is insisted that the statute is invalid because it violates the constitutional rights guaranteed by sec. 1, art. I, and sec. 23, art. IV, of the constitution of the state. Sec. 23, art. IV, is as follows:

"The legislature shall establish one system of town and county government, which shall be as nearly uniform as practicable."

The elective franchise may be regulated to prevent corruption and to secure to the elector an honest and orderly exercise of the right to cast his ballot. The right is one secured to him by the constitution. As declared in *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N. W. 1041:

"So the right to vote is one reserved by the people to members of a class and as so reserved, guaranteed by the declaration of rights and by sec. 1, art. III, of the constitution. It has an element other than that of mere privilege."

It is also stated that:

"Constitutional provisions are specific and largely exclusive in regard to the qualifications of voters, but they are necessarily general in prescribing the way in which the voting shall be done, this being left almost wholly to statutory direction." 9 Ruling Case Law, 1046.

Does this statute relate to and deal with local governmental affairs so as to make it a part of the system of county government within the contemplation of sec. 23, art. IV, of

the constitution? Sec. 9, art. XIII, of the constitution provides:

"All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct."

The clear intent and object of this constitutional provision is to reserve to the people of the county the right to elect county officers unless otherwise provided for in the constitution. The right so retained by the people of the counties is thus made a part of the county governmental system of the state. The legislature has carried out this constitutional scheme by appropriate legislation, designating how the county officers shall be elected or be appointed by county authorities. Since the selection of county officers is thus related to and deals with county government, the question recurs: Is the method of nominating and electing county officers as provided in this statute repugnant to the constitutional requirement providing that but one system of town and county government shall be established by the legislature, and that such system shall be as nearly uniform as practicable? It is without dispute that the plan of nominating and electing county officers in the counties of Wisconsin as established by the legislature is radically different from the plan provided for by ch. 566, Laws 1919 (sec. 5.265, Stats.), for counties having a population of over 250,000. The two regulations for electing county officers cannot be treated as being practically a uniform system of county elections. The diversity between the two systems of carrying out the constitutional mandates of arts. XIII and IV, above referred to, in the counties of the state generally and the class of populous counties included in this statute, is so obvious as to require no detailed specification. But it is urged in support of the validity of ch. 566 that the legislative classification of counties as made therein has been ap-

proved by this court as proper if the classification is based on substantial distinction, is germane to the purpose, if it applies to all members of the classes made, is not based on existing circumstances alone, and permits future additions to the classes as circumstances arise, and that if these characteristics of classification have been followed by the legislature in the adoption of this enactment, then the act is not assailable on the ground that it is class legislation and that it therefore does not violate the requirement that laws shall operate uniformly throughout the state nor the provisions of sec. 23, art. IV, of the constitution. In answer to the claim that the provisions of the last article were designed by the framers to prevent continuance of the existing territorial diversity of county government in different parts of the territory, this court declared:

". . . If such had been the only object, it would have been fully accomplished by the first part of the clause under consideration. When the framers of the constitution had said that the legislature should establish but one system of town and county government, that would have fully remedied the evil. But they did not stop there. They added, that this system should be *as nearly uniform as practicable. In this they must have aimed at the evil of special legislation.* That this is a great and serious evil, every one at all familiar with legislative experience knows. . . . It is an evil that there have been many efforts made to check; and I can conceive of no other motive for the clause in the constitution requiring the system of county and town government to be as uniform as practicable." *State ex rel. Keenan v. Milwaukee Co.* 25 Wis. 339. See, also, *State ex rel. Peck v. Riordan,* 24 Wis. 484.

In the latter case the court states that—

"Where the legislature has established a system of county and town government substantially uniform throughout the state, it may be conceded that its action is final upon the matter. . . . But, when a law . . . breaks the uniformity of a system already in operation, it seems to us that it is a proper exercise of judicial power to declare that the act is

void, because it departs from the rule of uniformity which the constitution enjoins."

We repeat these expressions of this court interpreting sec. 23, art. IV, to show how these provisions of the constitution were understood and interpreted by those who took an active part in the times of their adoption. A review of the cases in this court wherein this constitutional provision was involved will be found in the opinion written for the court by Mr. Justice TIMLIN in *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431. It was there held, in the light of this constitutional provision, that "a general law applicable to a class of counties may provide for reasonable departures from uniformity in county government in cases where it is not practicable to carry on such government in that particular class of counties in the same manner in which it is carried on in other counties outside of its class." The significant thing is that a general law applicable to a *class of counties* providing for a departure from uniformity in county government must rest on facts and existing conditions showing that it is not practicable to carry on the county government in such particular class in the manner that the statute provides for carrying on the county governments in counties generally throughout the state. It follows from this that the generally accepted grounds upon which a legislature may classify subjects for general legislation are not sufficient when it attempts to classify counties within the field relating to the system of county government under the mandate of sec. 23, art. IV. The terms of this constitutional provision expressly inhibit departure from the established uniform system of county government unless it is manifest that it is not practicable to carry on such uniform system of government in a designated class of counties.

Is there anything in the conditions surrounding the exercise of the elective franchise for electing county officers in

populous counties that requires a departure from the methods and means provided for the exercise of such right in electing county officers in the less populous counties of the state to enable the voter to express properly and intelligently his choice for such office at the ballot box? No satisfactory grounds of distinction have been brought to our attention and none are suggested to our minds that could form the basis of legislation like the act here in question. It is not sufficient to say that the legislature must have discovered in the conditions of the densely populated communities good grounds for departing from the established system of conducting the primary and general elections in counties generally throughout the state. Under the mandate of the provisions of sec. 23, art. IV, of the constitution, the grounds for enacting a general law applicable to a class of counties providing a departure from the established uniform system of county government must affirmatively appear with reasonable clearness and certainty to warrant such departure. As above indicated, the conditions under which an elector is called to discharge his duty in selecting the county officers in populous counties are no different from those imposed on the electors in the more sparsely settled communities of the state. There are no considerations addressed to the elector in such counties different from those addressed to him in all counties, nor is there anything in the election machinery applicable to the primary and general elections requiring a different method of electing county officers in such counties that cannot be applied with equal facility in all other counties. A consideration of the established system of county government, regulating the conduct of elections for the nomination and election of county officers, shows that it is a system adapted to and fulfils its objects and purposes equally well in all of the counties of the state. It is considered that ch. 566, Laws 1919 (sec. 5.265, Stats.), is an unjustifiable departure from the uniform system of county government established by the legislature of the state and

that it violates the provisions of sec. 23, art. IV, and that the board of election commissioners of Milwaukee county must be restrained from following and enforcing the provisions of ch. 566, Laws 1919, in conducting the 1920 primary and general election for county officers of Milwaukee county.

By the Court.—Judgment ordered for relator for relief by injunction as prayed for in the complaint. No costs are allowed to either party in this action, the defendants to pay the fees of the clerk of this court.

STATE, Plaintiff in error, vs. LABUWI, Defendant in error.

June 5—July 3, 1920.

Criminal law: Obtaining money under false pretenses: Declarations of co-conspirators: Admissibility against one: Sufficiency of evidence: New trial: Order proper although based on an erroneous reason: Effect on appeal.

1. Where defendant and others entered into a conspiracy to hold a Fourth of July celebration and falsely represented that the proceeds of the celebration would be turned over to the American Red Cross Association, declarations of the other co-conspirators, made prior to the division of the money, were admissible against defendant on trial for obtaining money under false pretenses.
2. An order granting defendant a new trial after conviction should not be set aside, although given for an erroneous reason, if a new trial should have been ordered for any of the reasons assigned in the motion therefor.
3. The evidence in this case, although circumstantial, is *held* to show beyond a reasonable doubt that more than $100 was received from people who patronized the celebration because of the false representations, so as to make applicable the greater penalty provided for by sec. 4423, Stats.

ERROR to review an order of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The defendant in error, hereinafter referred to as the defendant, was informed against for, and convicted of, obtain-

ing money under false pretenses. The defendant advertised, managed, and conducted a celebration in the village of Neosho on the 4th day of July, 1917, jointly with one August Nell and Mary Franke. The advertising announcements of the celebration, in the form of bills, posters, and newspaper notices, stated that the proceeds of the celebration would be turned over to the American Red Cross Association. After a verdict of guilty had been returned, the defendant moved the court, upon the minutes of the judge, that the verdict be set aside and a new trial granted, for various reasons, the material ones of which will be referred to in the opinion. The court set aside the verdict and granted a new trial, for the reason, as plainly appears from his written opinion, that error was committed in receiving the testimony of admissions made by the co-conspirators of the defendant, August Nell and Mary Franke, subsequent to the time when the court held that the conspiracy had been consummated. The state appealed from the order granting a new trial, under the provisions of sec. 4724*a*, Stats.

For the plaintiff in error there was a brief by the *Attorney General, J. F. Baker,* assistant attorney general, and *C. A. Markham,* special district attorney for Dodge county; and the cause was argued orally by *Mr. Baker* and *Mr. Markham.*

For the defendant in error there was a brief by *C. M. Davison* of Beaver Dam and *G. A. Hartmann* of Juneau, attorneys, and *Frank T. Boesel* of Milwaukee, of counsel; and the cause was argued orally by *Mr. Boesel.*

OWEN, J. The circumstances out of which this prosecution arises may be stated briefly as follows: The defendant, August Nell, and Mary Franke associated themselves together for the purpose of managing and conducting a Fourth of July celebration at the village of Neosho in 1917. They advertised that the celebration was to be given for the benefit of the American Red Cross Association. The cele-

bration attracted a great concourse of people. An admission fee was charged, lunch and refreshment stands were conducted, and the attractions of the ordinary Fourth of July celebration were provided. The evidence disclosed that a great number of people were induced to attend this celebration for the very reason that they believed that it was held for the benefit of the Red Cross Association and that by patronizing the celebration they would be helping the association. It appears that a considerable sum of money was realized by the promoters, who failed to account to the Red Cross Association for any part of the proceeds or profits of the venture.

The defendant *Labuwi* was arrested on a warrant charging him with obtaining money under false pretenses by reason of the facts above set forth. By the institution of *habeas corpus* proceedings he raised the question of whether the facts above set forth were sufficient to constitute the offense of obtaining money under false pretenses, and this court ruled in the affirmative upon that question. *State ex rel. Labuwi v. Hathaway,* 168 Wis. 518, 170 N. W. 654.

Upon the trial the state introduced in evidence testimony given by August Nell and Mary Franke upon the so-called John Doe hearing, held January 25, 1918, before J. D. Lyons, justice of the peace, in the village of Neosho. The reception of this evidence by the court was assigned as ground for a new trial. The trial judge concluded that the reception of this evidence constituted error because the statements were made after the purpose of the illegal combination had been accomplished. He held that there was competent evidence in the case upon which a finding might be based that a conspiracy had been entered into and that the declarations were voluntary within the meaning of that term as defined in the law. This appeal, therefore, presents the question of whether the purpose of the illegal combination had been accomplished at the time the statements of the co-conspirators received in evidence were made. A perusal

of the defendant's own evidence leaves no doubt that the defendant, Nell, and Franke associated themselves together for the purpose of holding the celebration for their joint benefit and that each was to share equally in the proceeds of the venture. It is also plain from the evidence of the defendant that at the time of the trial there had been no division, especially no final division, of the proceeds among the three. The trial judge was of the opinion that the purpose of the conspiracy had been accomplished as soon as the celebration was over. Upon this theory he was no doubt correct in concluding that the statements made by the co-conspirators some six months thereafter were inadmissible. It is only the declarations of co-conspirators made while the conspiracy is pending and in furtherance of or with reference to the common design that are admissible against all. At the time the statements of the co-conspirators introduced in evidence were made, January 25, 1918, the Fourth of July celebration had been terminated. This part of the conspiracy had been accomplished, but there had been no division of the proceeds thereof between the conspirators.

In *Baker v. State,* 80 Wis. 416 (50 N. W. 518), at p. 422, it is said:

"A conspiracy to commit an assault or a murder would, of course, be ended when the assault or murder was committed; but a conspiracy to steal money and divide the proceeds is plainly not at an end until the division takes place, and this view is supported by authority."

In that case Baker and Perrin were prosecuted for the larceny of $39,000 from the vault of a bank. The evidence tended to show that the arrangement between Baker and Perrin with reference to the disposal of the moneys and drafts found on Baker, and which the state claimed was a part of the money stolen, had not terminated; that there was still something to be done by Baker with the drafts found on him for Perrin's benefit. The court said:

"If this be true, . . . then it is manifest that the objects

of the conspiracy were not fully accomplished at the time of Baker's arrest. The conspiracy, if there was one, was still pending. Under these views of the law, it is obvious that the evidence as to Perrin's conversation with Lyon, as to when the mining company expected to have its pay-day, was admissible; also the evidence as to conduct and exclamations of Perrin on the night of the larceny, and with reference thereto; also his expenditures of money after the larceny; also his conduct at Paeske's store, on the evening of the larceny."

We perceive no distinction between the two cases in this respect, and it seems clear that the statements of the co-conspirators here, received in evidence, were properly admitted, for the reason that the conspiracy had not been terminated. The proceeds thereof had not been divided. The trial court, therefore, set aside the verdict and granted a new trial upon a misunderstanding of the law applicable to the situation.

Defendant contends that even though a new trial should not be granted for the reason stated by the trial judge, nevertheless, if there was a mistrial for other reasons assigned upon the motion for a new trial, the order granting a new trial should not be reversed because the court was in error in granting the motion upon the ground specified. We think this is a correct view of the law, and that if a new trial should have been ordered for any of the reasons assigned as grounds therefor upon the motion made in the lower court the order should not be reversed. We have therefore examined the other reasons assigned as grounds for a new trial in the lower court. We think that but one merits discussion here.

The jury by its verdict found that the amount of money obtained by the false pretenses was $1,350. The question as to the amount of money received by virtue of the false and fraudulent representations is material only because the statute, sec. 4423, prescribes a greater penalty where the money so obtained exceeds $100. The exact amount received is immaterial. The material question is whether the

amount received was in excess of $100. The state produced a number of witnesses who testified that they were induced to attend the celebration because they supposed it was intended for the benefit of the Red Cross and that by their patronage thereof they would be helping a worthy cause. It is admitted in defendant's brief that the testimony of these witnesses shows that they spent the aggregate sum of $53.25 at the celebration. The defendant, to meet this evidence, produced twelve witnesses who testified that they attended the celebration, but that in doing so they were not actuated by the representation that the celebration was being conducted for the benefit of the Red Cross. It may be conceded that there is no direct evidence supporting the verdict of the jury with reference to the amount fraudulently obtained. The question arises whether, under the circumstances of this case, such direct and positive proof of the amount of money received is necessary. The question naturally arises, Why may not this fact, as well as any other fact in a criminal prosecution, be proved by circumstantial evidence? When it is reflected that the celebration was patronized by many hundred people, the practical impossibility of calling every person so attending, or any considerable number thereof, for the purpose of showing whether or not they were induced to attend the celebration by the false representation, and the amount of money spent thereat by each person so attending, or any considerable number of them, is apparent. The material question is whether the defendant and his co-conspirators obtained more than $100 by reason of the false and fraudulent representations. It is not necessary that there be evidence in the record to support the exact amount found by the jury. The question rather is, Is the evidence, taken as a whole, convincing beyond reasonable doubt that the amount received exceeded the sum of $100?

The celebration was held at a time when the patriotic instincts of the people were thoroughly aroused. The associa-

tion of the Red Cross was doing a grand work in connection with the prosecution of the war and its achievements were generally applauded. People responded generously to its every appeal for funds, and there can be no doubt that this was the very reason for the representations made by the defendant and his associates that the proceeds of this celebration would be paid to the American Red Cross Association. As stated by the learned trial judge in his opinion:

"It was proper [for the jury] to consider the advertised purpose of the celebration, the evidence as to the number of people in attendance and the gross receipts, the fact that the country was at war and the work of the Red Cross, the probable effect upon the ordinary person of an appeal to patriotism at such a time, as well as what was stated by witnesses who, in giving their reasons for attending the celebration, said they were or were not influenced by the advertisements that the proceeds would go to the Red Cross."

A number of witnesses, not exceeding ten, were called by the state to testify that they patronized the celebration because of these considerations, and they expended in the aggregate the sum of $53.25. We think that the inference is beyond reasonable doubt that more than $100 was received from the vast number of people who patronized the celebration because of the false and fraudulent representations. The evidence, though circumstantial, is strong and convincing.

We think the verdict of the jury is supported by the evidence, was not induced by material error, and that it should stand.

By the Court.—Order appealed from is reversed, and cause remanded with directions to enter judgment upon the verdict.

ESCHWEILER, J., dissents.

CASES DETERMINED

AT THE

August Term, 1920.

H. H. CAMP COMPANY, Respondent, vs. PABST BREWING COMPANY, imp., Appellant.

January 16—September 25, 1920.

Landlord and tenant: Assignment of lease as security for advances: Covenant by assignee to pay rent: Eviction to mitigate damages: Parol evidence.

1. A brewing company making advances to saloon-keepers and taking as security an assignment of their lease, and, to procure the consent of the landlord to the assignment, agreeing in writing "to perform all the terms . . . of said lease," is presently liable for the rent.
2. The agreement being clear and unambiguous upon its face and as applied to the subject matter, there is no room for construction nor for oral testimony to show the intent of the parties in entering into it.
3. The landlord is under no obligation to mitigate damages in behalf of those liable for the rent by evicting the tenant and reletting the premises.

OWEN, SIEBECKER, and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

Action to recover taxes and rent accruing under a lease made by plaintiff to Weber & Stuber and under a written agreement on the part of the *Pabst Brewing Company* to perform all the terms, covenants, conditions, and agreements of the lease. Plaintiff dealt in real estate and rentals

and had a ninety-nine-year lease on the premises occupied by Weber & Stuber, who for many years past had conducted a saloon therein under a contract with the *Pabst Brewing Company* that its beer should be sold there to the exclusion of all other domestic draft beers. As to such premises the *Pabst Brewing Company* has had a similar contract since 1874. In 1915 Weber & Stuber's lease expired and they entered into a new lease for ten years and agreed to pay rent and taxes and to make certain improvements. They found the cost of the improvements beyond their means and applied to the *Pabst Brewing Company* for advances, which were made on condition that Weber & Stuber should pay an increased price per barrel for beer, the increase to be in payment of the advances made. A written agreement was entered into between Weber & Stuber and the *Pabst Brewing Company* to the effect that if Weber & Stuber breached their contract with the *Pabst Brewing Company* it should be entitled to immediate possession of the leased premises. In the meantime Weber & Stuber were to remain in possession. The lease between plaintiff and Weber & Stuber provided that the premises should not be sublet without the consent of the lessor. The *Pabst Brewing Company,* to secure itself on its agreement with Weber & Stuber, obtained from them an assignment of their lease, but in order to secure the benefit of such assignment it was necessary to get plaintiff's consent thereto. In order to secure such consent they executed this agreement: "The said *Pabst Brewing Company* hereby agrees to perform all the terms, covenants, conditions, and agreements of said lease to be performed by the said lessees therein." This agreement was written into the assignment of the lease under the signatures of Weber & Stuber and above the written consent of plaintiff. Weber & Stuber at no time defaulted in their contract with the *Pabst Brewing Company* and the latter at no time entered into possession of the premises. Weber & Stuber remained in possession until about July 1, 1919, and paid rent to plaint-

iff until about January 1, 1917. The amount due under the lease for rentals, taxes, and interest was $16,891.67, and for such amount judgment was entered against Weber & Stuber and the *Pabst Brewing Company*. The latter appealed from the judgment.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *William C. Quarles* and *Henry W. Stark,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. William C. Quarles* and *Mr. Stark.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *James B. Blake* and *Paul W. Newcomb,* all of Milwaukee.

The following opinion was filed July 3, 1920:

VINJE, J. Appellant assigns as error (1) the conclusion of the court that it became presently rather than conditionally liable for the performance of the terms of the lease in view of the contracts between the parties; (2) the refusal to receive parol testimony in determining the object of the parties in executing and receiving its agreement to perform the terms of the lease and in showing the real nature of the transaction; and (3) in refusing to hold it was the duty of plaintiff to mitigate its damages by evicting Weber & Stuber in 1917, and reletting the premises at the best rent obtainable.

We do not deem it advisable in this opinion to treat the arguments of counsel as to many phases of the case, because we deem the plain terms of the written agreement of the parties and their conduct under such agreement determine the vital question in the case. The trial court concluded that the written agreement of the *Pabst Brewing Company,* set out in the statement of facts, created a present contract between it and plaintiff enforceable at once in case Weber & Stuber breached any of the terms of the lease, and did not constitute a conditional relation establishing merely privity of estate in case the *Pabst Brewing Company* should take

possession under the lease, as claimed by appellant. We think the circuit court reached the correct conclusion for these reasons: first, the plain import of the language of the agreement is to that effect; second, the relation of the parties under their contracts made such an agreement a reasonable one; third, the parties so construed it; and fourth, the agreement would be meaningless construed as appellant claims it should be.

Very little can advantageously be added by way of argument to the first reason assigned. The language is plain, simple, and direct to the effect that the *Pabst Brewing Company* will perform all the terms, covenants, conditions, and agreements of the lease to be performed by the lessees. The obligation to perform is specific, is not contingent upon any future condition such as possession, but is absolute *in præsenti* and couched in language that includes any breach by the lessees. The *Pabst Brewing Company* agreed to see that from the time of the signature of that agreement the terms of the lease would be met by the lessees or itself.

As to the second reason, it is true that plaintiff had already made its lease to Weber & Stuber and in doing so had relied upon their credit. But they were to make substantial improvements, and when the agreement was signed it was apparent that Weber & Stuber could not make such improvements without financial aid from some one. A different situation then presented itself from what obtained when the lease was first made. The *Pabst Brewing Company* was interested in the location and in Weber & Stuber, and it was natural that plaintiff should want to get additional security for its lease. This it could and did do by requiring the *Pabst Brewing Company* to enter into its written agreements as a condition of its consent to the assignment of the lease. Of course it was not contemplated by any of the three parties at the time the consent was given that it was likely that Weber & Stuber would breach their contract with the *Pabst Brewing Company* and thus allow or compel it to take pos-

session of the premises. That was a mere contingency that the *Pabst Brewing Company* wished to guard itself against by securing consent to the assignment of the lease. As a consideration for such consent on plaintiff's part the *Pabst Brewing Company* assumed the obligations of the lease, thinking no doubt that it would be, as perhaps it was, reimbursed by the exclusive sale of its domestic draft beer by Weber & Stuber. In short, plaintiff wished to make itself more secure, and the *Pabst Brewing Company* agreed to secure it believing it was for its interest to do so and that in the end it could give such security without cost to itself.

The agreement in question was executed in December, 1914. In March, 1916, the plaintiff wrote the *Pabst Brewing Company* that the lessees were in default, setting out the provisions of the lease as to the payment of taxes and rents and informing the *Pabst Brewing Company* that the total amount in arrears was $1,744.03 and interest, and closed the letter thus: "Under the circumstances we feel compelled to direct your attention to the situation covering the defaults which have occurred under the terms of the lease, and request that you arrange for an adjustment of the matter at your early convenience." In reply the *Pabst Brewing Company* stated that it had had an interview with Weber & Stuber and had agreed to assist them in installing a bookkeeping system that would no doubt materially help them in checking their accounts, and that Weber & Stuber had agreed to make arrangements for the payment of taxes and back rent, and closed by saying: "Please keep us posted on any further developments in the premises, and you can rest assured that all matters will receive our prompt attention." No analysis of this correspondence is necessary to disclose the fact that plaintiff claimed the *Pabst Brewing Company* was liable for the defaults and that the *Pabst Brewing Company* admitted it was. Otherwise why should it wish to be kept posted as to a contract relation between plaintiff and Weber & Stuber in which it was not interested.

It was not until a year later, after it had consulted counsel, that it denied liability.

The agreement, unless construed as the circuit court construed it, namely, creating an immediate privity of contract, would be meaningless. If the *Pabst Brewing Company* entered under the lease a privity of estate would at once exist between it and the landlord, and it would under such privity of estate be bound to perform the lease as to rents and taxes accruing under its occupancy. No written agreement to that effect would be necessary. If it be claimed the agreement entered into would compel the *Pabst Brewing Company* to pay up all arrears in rents and taxes only in case it took possession under the lease, a sufficient answer is that the agreement does not so provide. It is not, as before stated, made upon any condition whatever as to the *Pabst Brewing Company* except that there be a breach by the lessees, Weber & Stuber, in which event the liability of the *Pabst Brewing Company* is absolute. Many cases have been cited by counsel on both sides bearing upon collateral questions. We do not deem them of much importance because we base our decision upon the plain language of the agreement, and hold that it creates a present contract relation, specific and unambiguous both upon its face and as applied to the surrounding circumstances; and was so understood by the parties, as is shown by the correspondence referred to above. Rights and liabilities resulting from the relation of privity of estate do not arise in this case and are therefore not discussed.

Since the contract is clear and unambiguous upon its face and as applied to the subject matter, there is no room for construction nor for oral testimony to show the intent of the parties in entering into it. *Hammond v. Capital City Mut. F. Ins. Co.* 151 Wis. 62, 138 N. W. 92. The trial court's refusal to receive such testimony was therefore proper.

A landlord is under no obligation to mitigate damages by

evicting the tenant and reletting the premises. In most jurisdictions it is held that even if the tenant abandons the premises he is under no obligation to re-enter and relet; that he can stand upon the terms of the lease and recover rent for the whole term. 24 Cyc. 1164; 16 Ruling Case Law, 669 and cases cited. It is not here necessary to hold more than that the landlord is not required to evict the tenant to mitigate damages in behalf of those liable for the rent.

By the Court.—Judgment affirmed.

The following opinion was filed July 7, 1920:

OWEN, J. (*dissenting*). The majority opinion construes the language upon which the liability of the *Pabst Brewing Company* is predicated as an obligation in the nature of an original undertaking on its part to pay the rent of Weber & Stuber from the date of the assignment of the lease. With this construction I cannot agree.

A consideration of the setting in which this agreement is found, the transaction of which it forms a part, the relation of the parties and their subsequent dealings, conclusively demonstrates to my mind that no such result was intended to be accomplished.

In 1915 the plaintiff executed to Weber & Stuber a new lease, running for ten years, by the terms of which the latter agreed to make certain improvements upon the premises. It transpired that these improvements would be much more expensive than was contemplated, and it was necessary for Weber & Stuber to make financial arrangements in order to comply with this provision of the lease. They appealed to the *Pabst Brewing Company*. That company agreed to advance to them in the neighborhood of $20,000. This sum was to be repaid in the nature of an excess charge on each barrel of beer supplied to Weber & Stuber by the *Pabst Brewing Company*. As a matter of security Weber &

Stuber executed to the *Pabst Brewing Company* an assignment of the lease executed to them by the plaintiff, providing that upon default the *Pabst Brewing Company* might take possession of the premises. It was not an assignment *in præsenti.* It was a conditional assignment merely, for the purposes of security, and so long as Weber & Stuber performed their contract with the *Pabst Brewing Company* that company acquired no right to the possession of the premises under the assignment. It was provided in and by the terms of the original lease that it should not be assigned without the consent of the lessor. The written assignment showed plainly upon its face that it was executed by Weber & Stuber to the *Pabst Brewing Company* for the purposes of security merely, and that unless a breach occurred on the part of Weber & Stuber the right of possession on the part of the *Pabst Brewing Company* would never arise. This assignment executed by Weber & Stuber was taken to the plaintiff with a request that it consent thereto. As a condition to its consent the plaintiff required the *Pabst Brewing Company* to sign an agreement at the foot of Weber & Stuber's signature, in the following language: "The said *Pabst Brewing Company* hereby agrees to perform all the terms, covenants, conditions, and agreements of said lease to be performed by the said lessees therein." Thereupon it appended its written consent to the assignment of the lease at the foot of such agreement.

The question is, What was the nature of the obligation assumed by the *Pabst Brewing Company* under said agreement? The lower court, and the majority opinion here, holds that the *Pabst Brewing Company* obligated itself to pay all rent arising under the terms of the lease from that date. That such was the intention of the parties is rendered doubtful by the fact that Weber & Stuber continued in the possession of the premises and continued to be liable to the plaintiff under the terms of the original lease signed by them. Plainly it was not the intention of the parties to sub-

stitute the *Pabst Brewing Company* for Weber & Stuber as the primary obligors upon the lease. They not only continued in possession, but the plaintiff continued to look to them for the payment of the rent. If the construction of the court be correct, we have the very novel and extraordinary circumstance of two parties being primarily liable in the absence of any joint, or joint and several, undertaking. It is not intended to intimate that such a circumstance could not arise, but the very extraordinary character of the situation is in and of itself a strong circumstance to negative such an intent on the part of the parties.

The majority opinion suggests that while the plaintiff relied upon the financial responsibility of Weber & Stuber in making the lease, the fact that they found it necessary to make financial arrangements in order to raise the money for the improvements might have shaken the confidence of the plaintiff in their financial responsibility, and when presented with the written assignment of the lease it seized the opportunity to obtain security for the payment of the rent. If this were the intention of the parties, it is submitted that the language employed was poorly adapted for the accomplishment of such purpose and not such language as is ordinarily used under such circumstances. If it were the intention of the parties that Weber & Stuber should continue in the possession of the premises, retain their contractual obligations with the plaintiff, and it should look to them primarily for the payment of the rent, resorting to the *Pabst Brewing Company* therefor only upon default of Weber & Stuber, then the intention of the parties was that the *Pabst Brewing Company* should become guarantor of the rent, and this agreement, ordinarily, would have been expressed in the usual and ordinary terms of a guaranty, and the liability of the *Pabst Brewing Company* would be but secondary, so to speak. It is conceded, however, on the part of every one that the liability of the *Pabst Brewing Company* is primary and not secondary. The fact that the agreement was not

in the form of a guaranty, to my mind conclusively negatives the idea that it was the intention of the parties, or any of them, that the *Pabst Brewing Company* should become liable for Weber & Stuber's rent, or that it assumed any liability whatever under the terms of the lease so long as Weber & Stuber remained in the possession of the premises.

But the question persists, What was the purpose of the agreement? It is submitted that the agreement is one which ordinary care and prudence would prompt the plaintiff to demand if the assignment were to take immediate effect, for the reason that it is well settled that the assignee of a lease assumes only such liabilities and responsibilities as arise from the privity of estate growing out of possession. 24 Cyc. 982; *Bell v. American Protective League,* 163 Mass. 558, 40 N. E. 857; *Consolidated Coal Co. v. Peers,* 166 Ill. 361, 46 N. E. 1105; *Durand v. Curtis,* 57 N. Y. 7, 11; *Consumers' Ice Co. v. William H. H. Bixler & Co.* 84 Md. 437, 35 Atl. 1086; *Washington N. G. Co. v. Johnson,* 123 Pa. St. 576, 16 Atl. 799; *Peck v. Christman,* 94 Ill. App. 435; *Kribbs v. Alford,* 120 N. Y. 519, 24 N. E. 811; *Dolph v. White,* 12 N. Y. 296. For instance, the assignee of a lease whose liability is that arising from a mere privity of estate may assign the lease to a beggar and thereby escape further liability for the payment of rent. There are numerous covenants in the lease from the *Camp Company* to Weber & Stuber which are clearly personal covenants and do not run with the land. For example, the covenant prohibiting gambling on the premises or their use for other illicit or illegal purposes, or for purposes which would make the premises extrahazardous in the opinion of the superintendent of the Milwaukee board of fire underwriters; the covenants in regard to cleaning streets, alleys, and sidewalks in front of and around the premises, and to obey any and all lawful orders, rules, and regulations of any state or municipal officers, boards, or commissions having authority in the premises affecting the demised prop-

erty; that no unsightly signs and no advertising matter shall be placed by them (the lessees) on the outside of the demised premises, as well as the covenant that the lessees will not sublet said premises or assign the lease for any purposes whatsoever without the consent of the lessor in writing. These are all personal covenants. None of them run with the land, and in order to create a duty on the part of the assignee of the lease to comply with these terms therein, just such a provision as was signed by the *Brewing Company* was necessary. As above stated, it is just such a provision as care and prudence would require if the assignment of the lease were to take effect immediately, to the end that the assignee of the lease would be bound by each and every provision thereof.

Is there any reason to believe that the parties had any other or different purpose in mind simply because the assignment was given by Weber & Stuber to the *Brewing Company* as security for the performance of a collateral contract and the resulting fact that the *Brewing Company* might never come into possession of the premises? I am frank to say that I can see no reason for such a conclusion, when we concede, as it seems to me must be conceded, that the agreement upon which the liability of the *Brewing Company* is predicated is a natural and prudent condition to the consent of the assignment of the lease under any form. To my mind the conclusion is inevitable that the liability assumed by the *Brewing Company* was one to arise when and only when it came into possession of the demised premises under and by virtue of the assignment of the lease, and that until then there was no liability on the part of the *Brewing Company* whatever. The subsequent dealings of the parties are consistent with this view. The *Camp Company* continued to collect rent from Weber & Stuber and said nothing to the *Brewing Company* with reference thereto, except upon one occasion, when Weber & Stuber were in default for the payment of taxes for thirty days and were

in arrears for two months' rent. The *Camp Company* then (March 2, 1916) wrote to the *Brewing Company* calling its attention to the arrearages. While it may be inferred from the letter of the *Camp Company* that it looked to the *Brewing Company* for the payment of these arrearages by virtue of the agreement under consideration, the *Brewing Company* certainly did nothing that can be construed as assenting to such view. On March 11th the *Brewing Company* replied to the letter, saying they had had an interview with Weber & Stuber and had agreed to assist them in installing a bookkeeping system and that Weber & Stuber had agreed to make arrangements for the payment of the taxes and back rent and trusted that the *Camp Company* would be able to make a satisfactory adjustment with them. There is nothing in this letter which acknowledges responsibility on the part of the *Brewing Company* for the rent or taxes then due. The interest of the *Pabst Brewing Company* in the matter is not at all surprising. It was interested in Weber & Stuber to the amount of $20,000 and was interested in their continuance as a going concern. It was but natural that it should exercise its good offices in urging Weber & Stuber to continue the lease. Its conduct at that time amounted to nothing more than that of a friendly, though perhaps interested, mediator, and fell far short of a recognition of its liability under the terms of the agreement.

If it had been the purpose of the parties to impose an immediate liability upon the *Brewing Company*, such liability could have been made to appear in much less equivocal language. The agreement was phrased by an able practitioner in this court, from whom we do not expect such ambiguity of expression as will conceal its real purpose from all but a bare majority of the members of this court. I submit that the language in the setting in which it is found, inserted under the circumstances as they existed, was appropriate to impose upon the *Brewing Company* the liability herein ascribed to it, but that it is extraordinary and inappropriate

language to create the liability imposed by the majority opinion.

I am authorized to state that Mr. Justice SIEBECKER and Mr. Justice ESCHWEILER concur in the foregoing dissenting opinion.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

KUHN, Appellant, vs. WAGNER and another, imp., Respondents.

February 12—September 25, 1920.

Sales: Acceptance conditioned on sale of corporate stock on buyer's account: Demand for purchase price of stock: Measure of damages: Purchase of corporate stock: Implied condition: Pledge: Conditions: Recitals in contract: Effect.

1. A contract for the sale of a motor truck to the owner of five shares of stock in the corporation manufacturing the truck, with provisions relative to the seller's taking such stock in partial payment, is construed to mean that the buyer was not bound to accept and pay for the truck unless and until there had been a sale by the seller of the five shares of the stock transferred by the buyer, out of which sale $500 was to be retained on account of the purchase of the truck, and the balance made available to the buyer to apply on the price at the time fixed for its delivery.
2. In a sale of corporate stock it is an implied condition that the seller will give the requisite notices to the corporation and take the necessary steps to properly transfer title to the buyer.
3. The subsequent act of the buyer of the truck in attaching a sight draft on the seller to a notice to the company of the sale of the stock sent to him for signature by the seller and thereby demanding payment, is not such an act as entitles the seller to treat the contract as broken by the buyer; the seller of the truck, through his act in transferring the stock absolutely to a third person, being precluded from asserting a breach by the buyer.
4. The buyer of the truck, in such case, is entitled to recover, upon breach by the seller, the difference between the value of the

stock when the agreement was made and its value at the time of the trial of the action.

5. The pledgee of the corporate stock in this case is bound by the conditions appearing on the face of the stock and by the recitals in his contract with the pledgor.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Reversed.*

The plaintiff, *Fred Kuhn,* resident of the city of Shawano, was the owner of five shares of the capital stock of the Four Wheel Drive Auto Company of Clintonville, Wisconsin, prior to September, 1917. Defendant *E. K. Wagner* was interested in selling automobile trucks and negotiated for that purpose for some time with plaintiff. On September 28, 1917, at Shawano, Wisconsin, a written contract, the material parts of which are as follows, was signed by the parties:

One 2-ton Menominee truck, purchased by *Fred Kuhn,* Shawano, Wis., to be delivered April 1, 1918.

Price of same	$2,725 00
Less 5 per cent.	130 25
	$2,589 75
This payment to secure truck at present price	500 00
Balance	$2,089 75

[Signed] MENOMINEE MOTOR TRUCK CO.
Wisconsin Mgr., *E. K. Wagner.*

Purchaser.

Truck is to be purchased for cash if 5 shares of F. W. D. stock can be disposed of $575. $500 on deposit balance to be turned over to *Mr. Kuhn.* [Signed] FRED KUHN.

If stock is sold at $575 balance of truck is $2,000.

[Signed] E. K. WAGNER.

On October 12, 1917, a written order was signed by plaintiff and defendant *Wagner* on the D. F. Poyer Company of Menominee, Michigan, for such truck, the material parts of which are as follows:

Amount of deposit herewith inclosed	$2,725
This order is paid for with five shares of F. W. D. stock at $575 per share	$2,875

Stock to be sold by *E. K. Wagner* on or before Jan. 1, 1918, and money to be turned over to *Fred Kuhn* to the amount of.....$2,375
Deposit of $500 is to be kept with order..... 500
$2,875

Balance of $2,000 due when truck is delivered.

[Signed] E. K. WAGNER.
FRED KUHN.

On the same date plaintiff handed over the certificate for five shares of stock and the defendant signed a written receipt for the same as follows: "This is a receipt for five shares of F. W. D. stock belonging to *Fred Kuhn* of Shawano, and is turned over to *E. K. Wagner* for sale. Conditions are mentioned on order for motor truck."

Upon the face of such certificate of stock was printed the following provision from the by-laws of the Four Wheel Drive Auto Company:

"Not transferable unless ten days' written notice is served on the company, with price and name of purchaser, and failure of company to buy or place with other stockholders at such price."

On October 30th defendant *Wagner* received a loan of $500 from the defendant *Black*, turning over to him at such time the certificate of the five shares of stock as collateral security and signing at the same time the following document:

"Whereas, *E. K. Wagner* is owner of five shares capital stock Four Wheel Drive Auto Company, and whereas *Warde E. Black* has advanced $500 to said *E. K. Wagner* and has taken said Four Wheel Drive stock as collateral security, it is understood and agreed that in lieu of interest on said $500 said *Warde E. Black* shall receive one half of all dividends declared on said stock either in cash or in form of stock dividend during the time that said *E. K. Wagner* shall remain the owner of said stock.

"In event of sale of said stock, said *Warde E. Black* shall receive one half of selling price in excess of $575 per share, but in any event said *Warde E. Black* shall receive in case of

sale of said stock not less than $500 advanced by him, regardless of dividends which he may have received prior to said sale."

Wagner gave his promissory note on the same day to *Black* for $500, and there was attached to said note a written agreement transferring as collateral security for the payment of such note the five shares aforesaid, with the usual provisions in such form of collateral-security agreements, among them one giving power to the payee, at his option, of making a sale of such security.

The case was tried by the court without a jury upon the issues framed and upon the complaint and counterclaims, and in addition to what appears on the written contract and orders above quoted the court found that there was an additional agreement between the plaintiff and defendant *Wagner* that, whatever the five shares of stock were sold for, they should be accounted for to plaintiff at $575 per share; defendant to have all in excess of that and to make up any deficiency.

The court found that in December, 1917, defendant *Wagner* had a prospective purchaser for said stock at $520 per share, and that thereupon *Wagner* caused to be drafted a form of notice, of date of December 12th, as follows:

"To the Four Wheel Drive Auto Co., City:

"You are hereby notified that I have this day offered for sale to *E. K. Wagner* five shares of your capital stock at $575 each. This notice is made in accordance with your by-laws;"

and the same was sent to plaintiff for his signature and return. That plaintiff signed such notice, but, instead of returning it directly to *Wagner,* attached to it a draft for the amount of the five shares of stock at $575 per share, and forwarded both to a bank in Green Bay to be delivered to *Wagner* upon payment of the draft. The bank immediately notified *Wagner* of the arrival of such signed notice together with the draft.

That later on and under instructions or directions from *Wagner* the bank returned the draft and notice to plaintiff.

That a stock dividend of two and one-half shares and a cash dividend of $180 was declared on such stock in the interim, and such dividends had been held by the defendant corporation pending the determination of this lawsuit.

That the defendant *Wagner* was at all times ready, able, and willing to perform the contract between himself and plaintiff in all respects and did in fact tender performance thereof in accordance with its terms.

Also that, plaintiff having refused to take the truck as ordered, there were damages accruing to the defendant consisting of the loss of $100 deposited by *Wagner* with the manufacturers of the truck and the loss of profits he would have made on the sale, amounting in all to $302.50.

It was further found, based upon a stipulation between the parties, that the value of the stock at the time of the trial was $190 per share.

The court also found that *Black* was apprised of facts from his possession of the stock that put him on inquiry as to plaintiff's rights.

As conclusions of law, upon which judgment in accordance therewith was entered, it was held that defendant *Wagner* was entitled to receive from plaintiff the executed notice of sale of the stock without previous payment of the draft or other condition; is entitled to damages of $302.50, and such damages with the clerk's fees to constitute a lien on the five shares of stock in the possession of defendant *Black*. That defendant *Black* was not entitled to a lien as against the plaintiff, but only as against *Wagner*.

It was further determined that such stock might be sold at the instance of the defendant *Wagner* to secure the payment of the amount adjudged in his favor.

From the judgment entered in accordance therewith the plaintiff has appealed.

For the appellant there was a brief by *Eberlein & Larson* of Shawano, and oral argument by *M. G. Eberlein.*

For the respondents there was a brief by *Kittell & Jaseph* of Green Bay, and oral argument by *L. D. Jaseph.*

The following opinion was filed June 1, 1920:

ESCHWEILER, J. It is contended on behalf of defendant that the agreement between plaintiff and *Wagner* as evidenced by the writings of September 28 and October 12, 1917, set out in the statement of facts, should be construed to embody two separate and independent contracts, one by plaintiff to purchase the auto truck, and the other by *Wagner* to dispose of plaintiff's five shares of stock, and that the agreement to purchase by plaintiff was not dependent upon a prior sale or accounting by *Wagner* of plaintiff's stock.

We think it plain, however, that the reasonable construction to be given to the contracts between plaintiff and defendant *Wagner* was that plaintiff was not bound to accept and pay for the truck unless and except there had been a sale by *Wagner* of the five shares of stock, out of which sale $500 was to be retained as a deposit on account of the purchase of the truck and the balance thereof evidently to be made available to plaintiff to apply on the purchase price of the truck at the time fixed for delivery thereof in the following April.

As between plaintiff and defendant *Wagner,* therefore, the plaintiff could not be held liable on account of any failure on his part to buy and pay for the truck unless and except the defendant *Wagner* had first sold and accounted for the proceeds at the agreed amount of $575 per share before January 1st, or at least before the time arrived at which plaintiff was to make final payment for the truck, or unless plaintiff himself had otherwise breached the contract.

Unless the trial court was correct under the law and evidence in this case in determining that the plaintiff had breached the contract by attaching to the notice signed by

him to be presented to the Four Wheel Drive Auto Company the sight draft for the agreed price of $575 per share for the five shares, and the implied, if not express, direction to the bank that such notice should not be delivered except upon payment of such sight draft, the judgment below must be reversed.

In the writings between plaintiff and *Wagner* in September and October nothing was said as to the furnishing of the notice specified on the face of the certificates and embodied in the by-laws of the Four Wheel Drive Auto Company. It appears from *Wagner's* testimony that such by-law and the necessity of such notice did not come to his attention until December and sometime after he had pledged the stock, asserting unequivocal ownership therein by his written agreement with defendant *Black* set forth in the statement of facts.

It may be conceded that notwithstanding the contract between plaintiff and *Wagner* was silent as to the giving of such notice it would still be an implied condition of such contract that plaintiff, *Kuhn,* should take the necessary steps in order to properly pass title of the certificates of stock from himself to defendant *Wagner;* yet we are nevertheless forced to the conclusion that defendant *Wagner* is not, under the testimony in this case, entitled to assert that such attaching of the sight draft and thereby demanding payment was such an act as entitled him to treat the contract as broken by plaintiff and therefore making plaintiff subject to the damages asserted by defendant and allowed by the court.

In the first place, the testimony is without dispute that no word of protest or objection was raised by *Wagner* and brought to the attention of plaintiff at any time while the notice, with the attached draft, was in the hands of the bank in Green Bay, from about January 2d until returned. In that interval *Wagner's* attention had been called by the bank to the fact that the notice and draft were in its hands awaiting his attention. He delays at first giving any atten-

tion to the matter, and at no time during that interval suggests any objection to such procedure, and does no more than suggest to the cashier that there was some dispute about the amount that should be paid or that he wished to see plaintiff about it.

It is also quite clear from *Wagner's* own testimony that he did not then or at any time have any binding contract of sale for this stock to any third person then able, ready, and willing to pay the price he mentioned of $520 per share, or that he was able, ready, and willing to make up the difference between the $520 and the $575 per share, for which amount it was to be accounted for to plaintiff.

Up to the time of the return of the draft and notice and afterwards *Wagner* makes no protest to the plaintiff or notifies him in any manner that such action on plaintiff's part was being considered as a violation of the implied terms of the contract.

Having raised objections to the draft other than that it was an unauthorized act under the contract, and then having directed the cashier of the bank to return such draft and notice, as he did, still remaining silent as to any such claim as he now asserts of an absolute breach, and without any offer of return of the certificates of stock belonging to plaintiff, but which *Wagner* had already placed by his pledge to *Black* beyond his present power to return, he ought not to be heard to assert any such disastrous result as he now urges should follow from plaintiff's act in attaching the draft to the signed notice.

By his transaction with defendant *Black, Wagner* asserted in writing an absolute ownership of the stock, which, as between himself and *Black,* would necessarily estop him from asserting any benefit to himself by reason of such by-law as against *Black.* Having asserted absolute ownership of this stock in his transaction with *Black* and thereby having placed it beyond his power to return the stock to plaintiff except and unless the conditions of the contract with

Black were complied with, he ought not to be heard to assert that plaintiff's action with reference to the notice to the company was of substance sufficient to create an absolute breach of the contract between himself and plaintiff, when he either disregards it entirely or treats the same condition as to notice as of no weight or importance in his transaction with *Black*.

We are therefore of the opinion that there was no such substantial breach by plaintiff of the contract on his part as justifies the finding and judgment in favor of defendant *Wagner* in the court below.

The parties stipulated on the trial and subsequently in writing that the value of the Four Wheel Drive Auto Company stock was only $190 per share at the time of the trial, and the court so found. No finding was made as to the market value of the stock at the time of the transactions between plaintiff and defendant in the fall of 1917. From defendant *Wagner's* own testimony, however, it appears that he was negotiating for the sale of this stock in December at $520 per share. This makes the market value of the five shares as they then stood $2,600. At the time of the trial the five shares had become increased by the stock dividend of fifty per cent. thereof to seven and one-half shares. The value of these at the stipulated and found value of $190 per share amounts to $1,425, making a difference or depreciation in the value of the stock of $1,175. This we think to be the proper measure of damages accruing to plaintiff by reason of the stock and for which amount the plaintiff is entitled to judgment as against the defendant *Wagner*.

Although no finding was made in this regard by the court below because of the disposition there made of the issues, yet it appears from all the facts and circumstances reasonably certain that plaintiff could and would have made a sale at the market price of the stock during the time it was in *Wagner's* possession, and so far as defendant *Wagner* is concerned he could not properly be held to assert as a de-

fense to the damages thus awarded against him on account of such depreciation that plaintiff did not go through what would have been an idle ceremony of attempting to sell the stock to someone else, it being in *Wagner's* possession or control.

The court found that the defendant *Black* was chargeable with notice of the rights of the plaintiff as to this stock from what appeared on the face thereof and from the contract between himself and *Wagner*. Defendant *Black* urges in this court, upon notice to that effect, that such finding should be set aside. We see no reason, however, why such should be done, and defendant *Black* can assert no title to this stock as against the plaintiff.

It follows therefrom that the judgment should be reversed and plaintiff awarded a judgment for the amount of the damages as here found against defendant *Wagner*, with his costs in this court and the court below; that the five shares of stock held by defendant *Black* and the two and one-half shares of dividend stock held by the Four Wheel Drive Auto Company, defendant, together with the cash dividend declared in the interim by it and also so held, should be returned to plaintiff.

By the Court.—Judgment reversed, and the action remanded with directions to enter judgment in accordance with this opinion.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

CITY OF LA CROSSE and another, Respondents, vs. RAILROAD COMMISSION OF WISCONSIN and another, Appellants.

March 11—September 25, 1920.

Public utilities: Emergency orders: Jurisdiction of railroad commission: Inquest necessary to determine existence of emergency: Evidence: Common knowledge as to rise in prices during the war.

1. Sec. 1797*m*—99, Stats., relating to the temporary alteration or suspension of rates of a public utility on account of an emergency, does not require that the railroad commission, in determining whether or not such an emergency exists, shall undertake such an inquest as is required of it in order to establish permanent reasonable rates and adequate service, the commission being given power to act upon its own motion in a summary manner when it deems it necessary to protect the utility business or the interests of the people when they are threatened by emergency conditions of the nature contemplated by the statutes.
2. When an emergency exists under said sec. 1797*m*—99 requiring a temporary increase in rates, the railroad commission is to exercise its judgment in the matter, and its action is not to be overruled unless it appears that it exceeded its powers or that its acts impose unreasonable or unjust discriminatory burdens on the people or the utility.
3. An order of the railroad commission of June 30, 1918, increasing the rates which the Wisconsin-Minnesota Light & Power Company could charge for its gas, is *held* an emergency increase of rates under sec. 1797*m*—99 and within the power of the commission to make if in fact an emergency existed.
4. It is a matter of common knowledge that the cost of labor, supplies, fuel, and other material required to conduct a utility selling gas largely increased during the war period, and that such high prices continue to the present time, necessarily increasing the cost of doing business; and it is *held* that the evidence does not refute the finding of the commission that an emergency existed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from a judgment setting aside an order of the *Railroad Commission* entered on June 30, 1918.

On May 25, 1918, the *Wisconsin-Minnesota Light & Power Company* filed a petition with the *Railroad Commission* for an emergency increase of rates for gas sold by petitioner in the city of *La Crosse.* The petition recited that new conditions, due to uncontrollable and unexpected events in the cost of gas production, necessitated an increase in gas rates. A hearing was had at the city of *La Crosse* on June 11, 1918, and after taking testimony the order in question was granted by the *Railroad Commission* on June 30, 1918. Suit was brought by the city of *La Crosse* and *Henry Rooney* to have this order set aside. Upon the trial further evidence was introduced in circuit court, and the case was transmitted to the *Railroad Commission,* which on February 25, 1919, made an order modifying its order of June 30, 1918, so as to put in effect a surcharge of twelve cents per thousand cubic feet of gas in addition to existing rates, instead of a twenty-cent surcharge as provided in the order of June 30, 1918. As soon as the order of February 25, 1919, was reported to the circuit court, the *Wisconsin-Minnesota Light & Power Company* filed its cross-complaint asking that this order be reviewed by the court and that the matter of fixing the gas rate be remanded to the *Railroad Commission* for further consideration. Answers to the cross-complaint were filed by plaintiff and the *Railroad Commission.* After taking further testimony the matter was again transmitted to the *Railroad Commission,* which on July 8, 1919, made a report that an order had been made by it revoking its order of February 25, 1919, and re-establishing its order of June 30, 1918, authorizing a surcharge of twenty cents per thousand cubic feet in addition to the ten-cent surcharge authorized by its order of August 22, 1917. . . .

This order was granted by the *Railroad Commission* upon the grounds reported by them that the expense of gas production, such as labor, fuel and materials, coke sales, coke-

handling expenses, and raises of wages, had so increased that the defendant company would be unable to make a fair return on its investment without the allowed raise in rates.

On September 23, 1919, the circuit court filed its findings of fact and conclusions of law, setting aside the order of the *Railroad Commission* of June 30, 1918, for the reason that at the time such order was made no emergency existed within the meaning of that term as used in sec. 1797*m*—99, Stats. Judgment to that effect was entered. Defendants appeal from this judgment.

For the appellants there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, attorneys for the *Railroad Commission,* and *Charles McPherson* of Grand Rapids, Michigan, and *Lees & Bunge* of La Crosse, attorneys for the *Wisconsin-Minnesota Light & Power Company;* and the cause was argued orally by *Mr. Brossard* and *Mr. Andrew Lees.*

For the respondents there was a brief by *Charles H. Schweizer,* special counsel, *O. J. Swennes,* city attorney, and *J. E. Higbee,* of counsel, all of La Crosse; and the cause was argued orally by *Mr. Schweizer.*

The following opinion was filed June 1, 1920:

SIEBECKER, J. On June 30, 1918, the *Railroad Commission* made an order upon the petition of the defendant utility increasing the existing charges for gas in the city of *La Crosse* twenty cents per thousand cubic feet of gas in addition to existing rates, which included a ten-cent surcharge granted August 22, 1917. The *Commission* declared that the increase was justified in view of the increased cost of fuel, labor, and materials required to operate the gas utility. The nature of the proceeding was considered by the *Commission* in acting on the petition, and it was determined to be one under the provisions of sec. 1797*m*—99, Stats., for a temporary alteration of rates on

account of an emergency. Sub. 1 of this sec. 1797*m*—99 provides:

"The commission shall have power, when deemed by it necessary to prevent injury to the business or interests of the people or any public utility of this state in case of any emergency to be judged of by the commission, to temporarily alter, amend, or with the consent of the public utility concerned, suspend any existing rates, schedules and order relating to or affecting any public utility or part of any public utility in this state."

Sub. 2 provides:

"Such rates so made by the commission shall apply to one or more of the public utilities in this state or to any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission."

The power conferred by this statute is in its nature like the power conferred on the *Commission* to alter, amend, or suspend existing rates, schedules, or orders pertaining to the railroad traffic of the state. Sec. 1797—28, Stats. 1919.

It is manifest that these provisions confer powers on the *Commission* different from those granted it to order permanent reasonable rates for adequate service rendered the public by a utility. The language of this statute is that these powers shall be exerted by the *Commission* "when deemed by it necessary to prevent injury to the business or interests of the people . . . in case of any emergency to be judged of by the commission," and that any such rates made by the *Commission* "shall take effect at such time and remain in force for such length of time as may be prescribed by the commission." Manifestly the *Commission* is authorized to act within these powers to protect the people or any utility business of this state. The statute calls for summary action by the *Commission* to meet the unusual conditions of such business created by unforeseen and unexpected culmination of circumstances which threaten to injure the utility business or the interests of the public con-

nected therewith. The provisions do not require that the *Commission,* in determining whether or not such an emergency exists, shall undertake such an inquest as is required of it in order to establish permanent reasonable rates and adequate service of utilities. It is manifest that the *Commission* is given power to act upon its own motion in a summary manner when it deems it necessary to protect the utility business or the interests of the people when they are threatened by emergency conditions of the nature contemplated by the statutes. When this statutory condition arises, the *Commission* is to exercise its judgment in the matter, and its action is not to be overruled unless it appears that it exceeded its powers or that its acts result in unjustifiably imposing unreasonable or unjust discriminatory burdens on the people or the utility. The action of the *Commission* under these powers is not therefore to be judged upon the same grounds nor tested by the same conditions as are the orders it may make in establishing permanent reasonable rates or ordering adequate service. An examination of the record clearly shows that the proceedings taken before the *Commission* which culminated in the order of June 30, 1918, were in their nature for an emergency increase of gas rates, and that the parties to the proceedings as well as the *Commission* so considered them. It must be held that the order of June 30th is an order for an emergency increase of rates. While the *Commission* considered many facts that would necessarily be involved in determining a permanent reasonable and lawful rate, it declares expressly that it did not attempt to ascertain all the facts necessarily involved and required to be known to fix a permanent reasonable and lawful rate. It is to be noted that an application was pending before the *Commission* when this proceeding was in progress to have the *Commission* make such a permanent rate; presumably the *Commission* is acting in that matter. The provisions for emergency rates and services were evidently designed to empower the *Commission* to alter and suspend

rates, schedules, and orders under emergency conditions for immediate protection of the public utility business or the public interests during the time required by the *Commission* to enable it to establish permanent rates and orders for adequate service. The facts of the record disclose that the *Commission* was within its jurisdiction in promulgating the order of June 30, 1918, as an emergency order, if the facts and circumstances thus disclosed show that an emergency existed respecting the business of the defendant utility. The application for this emergency increase of gas rate and the order of the *Commission* were obviously made upon the ground that the conditions incident to the war caused a large and unexpected increase in the cost of labor, material, and supplies required to conduct this business. It is a matter of common knowledge that the cost of labor, supplies, fuel, and other material required to conduct the utility did largely increase during the war period and that such high prices continue to the present time. This increase in cost must of necessity have increased the expenses of conducting the business very materially and to a degree which in all probability rendered the rate theretofore established as a reasonable one under former conditions insufficient to meet these new and unforeseen circumstances of the high price of labor and the advanced cost of materials and supplies. This being true, can it be said that the *Commission* acted arbitrarily and unlawfully in the light of the facts disclosed to them? The *Commission*, upon subsequent investigation of the facts referable to the existing conditions on June 30, 1918, found that the gas rate in existence before this date did not yield a fair return to the utility as then conducted to meet the requirements of the enhanced cost of conducting the business, including interest and depreciation charges. An examination of the facts before us shows that this conclusion of the *Commission* was justified upon the facts then available to it for determining the fact of an emergency.

The *Commission* up to the time of trial in circuit court

had not been enabled to make an independent audit of the company's income account for the year 1918, nor to make a valuation of its property—two important factors in determining what is a reasonable and lawful gas rate under existing conditions. But it is claimed that the utility's conduct of its business was shown to be grossly inefficient and extravagant and that these conditions of the company's business account for any loss or impairment of its financial returns under rates existing prior to June 30, 1918. We are not satisfied that the facts of the record show this result with sufficient certainty to overturn the findings of the *Commission* on which the order of June 30, 1918, is based. The *Commission's* finding of the existence of the emergency must stand.

It is considered that the large and unforeseen increase in the cost of labor, supplies, and materials brought about by the conditions of the war was sufficient to show that an emergency existed in the conduct of the utility business which was operating and furnishing gas at a rate which was established as reasonable and lawful under conditions existing prior to the increased cost of labor, supplies, and materials, and that the facts before the court do not refute the *Commission's* conclusions that an emergency existed within the contemplation of the statute.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the trial court with directions to affirm the June 30th order of the *Commission* as an emergency order.

The following opinion was filed August 9, 1920:

OWEN, J. (*concurring*). I do not agree that the facts of this case constitute an emergency within the contemplation of the statute. While I think the order of the *Railroad Commission* should not be sustained as an emergency order, it is my opinion that it may be sustained as an order made

in due course. *Smith v. Railroad Comm.* 169 Wis. 547, 173 N. W. 312. I therefore concur in the result.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

EAU CLAIRE DELLS IMPROVEMENT COMPANY and another, Appellants, vs. CITY OF EAU CLAIRE, Respondent.
SAME, Respondents, vs. SAME, Appellant.

March 16—September 25, 1920.

Municipal corporations: Contracts made in proprietary capacity: Waters: City authorized by legislature to build dam and maintain waterworks: Authority to lease dam: Improvident contracts: Lease for ninety-nine years: Cost of dam not limited to bond issue authorized: Application of rentals: Estoppel of municipality to declare forfeiture: Acquiescence in breach of lease: Injunction: Nuisance.

1. The main purpose of ch. 231, Laws 1876, was to provide a waterworks system for the city of Eau Claire (*State v. Eau Claire,* 40 Wis. 533), and in operating such system the city acts in a proprietary and not in a governmental capacity, and may, generally speaking, exercise such powers as a private concern engaged in a like business may exercise; and the city could, without direct legislative authority, contract to have another build and operate a dam for waterworks purposes, and could lease the dam and so much of the water power as the city did not need for its own purposes.
2. A city, empowered to erect a dam for waterworks purposes, which was expressly authorized to lease the excess water power and the piers, booms, and other structures erected in connection with the dam, can lease the dam itself.
3. A lease executed by a city in the exercise of its proprietary capacity to operate a waterworks system, which protected the public purposes of the city, is not invalid, though it subsequently appear that it may have been improvident; nor is the lease invalid because it was to extend for a term of ninety-nine years.
4. Sec. 9, ch. 231, Laws 1876, authorizing an issue of municipal bonds to a stated amount for the construction of the works authorized by the act, is construed not to limit the expenditure for the erection of such works to that amount, so that the

municipality was not prohibited from leasing to a corporation which constructed a dam the surplus power in payment for such construction; in addition to delivering to the corporation bonds in practically the full amount limited.

5. A lease of the dam and surplus power by the city does not violate sec. 10, ch. 231, Laws 1876, requiring money received from the lease of water power to be applied to keeping the works in repair, payment of interest on the bonds, and for the creation of a sinking fund for the redemption thereof, where the lease reserved only a nominal rental, but required the lessee to construct and maintain the dam.

6. Waiver is the voluntary relinquishment of a known right and may be a defense though no detriment to the adverse party is shown; but in estoppel the existence of the truth of the fact complained of is not denied, but the right of the other party to complain thereof is denied because his previous conduct has caused the party asserting the estoppel to change his position in such a way that loss to him would result if the estoppel were not interposed. Conduct may be positive or negative, so that silence, where it is a duty to speak, may constitute an estoppel *in pais*.

7. A city may be estopped to declare a forfeiture of a contract for acts which it encouraged, even though such acts were a violation of state laws, since the estoppel is not urged as authority for violation of the law, but merely against the city's contract right to declare a forfeiture.

8. Where the contractual rights of the parties spring from a proprietary and not from a governmental exercise of municipal power, estoppel can be urged against the municipality on the same grounds and sustained by the same proof that is essential against a private person.

9. Where the evidence and the findings of the court disclose that the navigability of the stream is not affected, and no person has suffered damage, certain acts of the plaintiff in relation to the dam, although without legislative sanction, are not unlawful, and do not *per se* constitute a nuisance.

10. Where a city had leased to a corporation the dam and surplus water power, acquiesced in the building of a mill over the lock required to be maintained by the lease, and not only agreed, but required, the lessee to maintain flash-boards raising the water above the specified height, it could not enforce a forfeiture of the lease because of those violations after they had continued for more than twenty years.

11. In an action to restrain the forfeiture of a lease because the city was estopped from declaring a forfeiture for acts in violation thereof, the decree should not restrain the city from

influencing state officials to interfere with such use of the property, since, if the use was lawful, no interference will be presumed, and if it was unlawful the attention of officials should be called thereto.

12. Provisions in the decree enjoining the city from forfeiting the lease for acts it was estopped to question so long as the state did not compel the discontinuance of the acts, were objectionable as permitting a forfeiture by the city for past acts in case the state should declare them unlawful, and should be modified to permit forfeiture only for the continuance of the acts after they were declared unlawful.

APPEALS from a judgment of the circuit court for Eau Claire county: A. H. REID, Judge. *Modified and affirmed.*

Action to restrain the city of *Eau Claire* from declaring a forfeiture under a contract for the construction and lease of a dam and water power across the Chippewa river at *Eau Claire,* entered into between the city and the *Eau Claire Dells Improvement Company,* hereinafter called the *Improvement Company,* February 17, 1877, and to declare the rights of the city and of plaintiffs under said contract. The answer and cross-complaint of the city asked for a dismissal of the complaint upon the merits; that the contract referred to be declared illegal, and that plaintiffs and all parties claiming under them be held to have forfeited any rights they may have had under such contract in case it should be held to have been valid in its inception, and that the city be declared to be the owner and entitled to possession of the dam, water power, lands, and works connected therewith.

Only so much of the facts as are essential to an understanding of the material determinative questions in the case on appeal will be set out. The printed case consists of five volumes of about 500 pages each, and the findings of fact and conclusions of law cover over forty printed pages. The trial necessarily took a wide scope and many questions presented to the trial court are not here for review, and of those pressed upon us many are eliminated by the decision of those questions that ultimately control the case.

In 1876 the city of *Eau Claire,* being desirous of obtaining water power for municipal waterworks, secured the passage of ch. 231, Laws 1876, empowering the city to build a dam not to exceed sixteen feet in height across the Chippewa river. The act authorized the city "to pass and adopt all such ordinances, resolutions and orders as may be necessary or proper to construct, maintain, operate and regulate such waterworks, . . . and for the purpose of operating the same, to apply such portion of the water power created by said dam as may be necessary." "To erect, construct and maintain . . . such piers, booms, and other structures, as shall be sufficient for protecting and preserving the navigability of said river, so far as the same may be rendered necessary by reason of the construction and maintenance of the dam and works." "To let, lease, and rent any surplus water power . . . for manufacturing or other purposes;" and to "let, lease and rent any of the piers, booms or other structures which may be constructed . . . for any use or purpose which shall not materially obstruct the navigability of said river, or interfere with the successful operation and maintenance of the dam and works . . . and may fix the rents for water power." The act also provided that the dam "shall be constructed so as not to materially obstruct the navigation of said river, and shall contain a lock of sufficient capacity to safely and expeditiously pass steamboats and rafts of lumber, . . . and there shall also be constructed and maintained in said dam, separate and sufficient chutes and slides for the safe and convenient passage of logs," etc. There was also a provision that "all moneys which shall be received for the lease of water power . . . water rents, piers and booms . . . shall be applied to the purpose of keeping said works in repair, payment of the interest upon the bonds issued for the construction thereof, and for creating a sinking fund for the ultimate redemption thereof." By ch. 181, Laws 1880, it was provided that in the event the council leased the booms and structures the lessees might fix

the rents for water power. Ch. 6, Laws 1885, authorized the dam to be built to a head of eighteen feet, and ch. 263, Laws 1880, empowered the city to grant the privilege to any person or corporation to build for themselves and own such waterworks and to maintain and operate the same and to grant to such corporation the right "to use the dam and other necessary works herein authorized, so as to supply the said city and the inhabitants thereof with water."

The city, being financially unable to build a dam, entered into a contract with the *Improvement Company* whereby the latter agreed, among other things, to build the dam and lock with such piers and other structures above and below the dam as will preserve the navigability of the river so far as the same may be rendered necessary by the construction of the dam and works; to install water-wheels and machinery at the east end of the dam for waterworks purposes, and to reimburse the city for all sums paid for the dam site and flowage which the city was to acquire and for all sums the city may have to pay as damages by reason of the construction and maintenance of the dam and lock. Upon the faithful performance by the *Improvement Company* of the foregoing covenants, which were declared to be conditions precedent, the city agreed to let, lease, and rent to the *Improvement Company* for ninety-nine years, for the purpose of manufacturing, etc., . . . all the right, title, and interest of the city in and to all the water power . . . created by said dam and not immediately and continuously needed to propel the water-wheels to operate the waterworks or to preserve the navigability of the river; also the said dam, piers, booms, and other structures, excepting and reserving the water-wheels, shafts, and attachments to be used for waterworks purposes and a sufficient amount of water to operate the same, together with all right, title, and interest of the city then or thereafter in and to the lands occupied by the works, reservoir, and race (except such as was needed for waterworks purposes), etc., which lease (when made) shall con-

tain the following covenants, conditions, and agreements on the part of the *Improvement Company,* its successors and assigns: (1) To use the leased property so as not to materially obstruct the navigability of the river; (2) to maintain and keep in good repair the dam, lock, piers, and other structures for the full term of ninety-nine years; (3) to operate during the said term the said dam and lock and other structures leased in such a manner as not to materially obstruct navigation, and so that the successful operation of the waterworks, dam, race, and other works shall not be interfered with; (4) to operate and pass through the lock all steamboats, rafts of lumber, and to pass and drive down said river and over the dam all sawlogs, etc., designed for points below the dam; (5) to furnish the city where its water-wheels are located sufficient water to operate its waterworks and to operate said water-wheels and furnish sufficient power for the city's waterworks purposes; (6) to maintain and operate all of said works constructed by it in strict accordance as the same are authorized to be maintained and operated by the city by the act of the legislature and not otherwise; (7) to reimburse the city for ninety-nine years for all money it is called upon to pay by reason of the maintenance or operation of the dam, race, lock, and other works; (8) to pay all taxes during the term of ninety-nine years lawfully assessed or levied upon the property and rights to be leased; (9) to pay $1 per year as rental on the 1st day of July of each year; and (10) upon the expiration of the term to deliver up the leased property in good condition and repair.

The contract also provided

"that in case of the nonpayment of said rent, whenever and as fast as it becomes due, or in case of the noncompliance with said conditions precedent, or in case of the nonperformance, by said second party, of any of the covenants or agreements hereinbefore contained, on its part to be performed, then, in that case, the said city of *Eau Claire,* its attorney or assigns, shall, after giving thirty days' notice of such de-

fault to said second party or any of its principal officers, if such default then continues, have the full right to vacate this lease, and declare all the provisions, terms, and conditions thereof null and void; whereupon the said lessees shall yield up to the said lessor, its attorney, agent or assigns, full, quiet, peaceable and immediate possession of the said premises and rights hereby leased, anything herein contained to the contrary notwithstanding."

No lease as provided for in the contract was ever entered into by the parties, both having treated the contract as a lease.

The *Improvement Company* constructed the dam and works as required by the legislative act and the contract at a total expense of about $300,000, and has operated the same since, leasing part of the power to its co-plaintiff and to some other defendants in the case. No member of the common council or other city officer was directly or indirectly interested in the contract of 1877 or in the *Improvement Company*.

In periods of high water a few commercial boats, prior to 1877, navigated the Chippewa river as far as Chippewa Falls, about ten miles in a direct line above *Eau Claire*, but all such navigation above *Eau Claire* ceased as early as 1877 and was never afterwards resumed and is not practicable. No boat has ever applied to be locked through at the dam after its construction except one owned by the *Improvement Company* and used on its own pond above the dam.

From 1877 to 1886 the river at the dam was used for floating rafts of lumber down stream, but all such rafting ceased about 1886. Large quantities of logs and timber products have been floated down stream from an early day, but such floating had practically ceased at the time this action was begun in 1906.

Soon after the construction of the dam the *Improvement Company* began to use flash-boards in periods of low water, first thirty inches in height and later to a greater height, for

purposes of better handling and sorting logs in the pond and floating them below. In 1894 it increased the height and maintained them throughout the whole year, such increase being gradual, until a height of eight feet was reached in about 1900, at which height they have since been maintained. They can easily be removed and do not endanger the dam or property below it. The *Dells Paper & Pulp Company* is a lessee of the plaintiff, and in the winter of 1895-1896 it built, with the knowledge and consent of many members of the common council and board of public works, a pulp mill at a cost of over $100,000 on the site of the lock in the dam and has maintained it there ever since, preventing the passage of boats through it, if any there were. A boat hoist or marine railway would better answer the purpose for the passage of boats now upon the river should any be needed. Owing to the action of the current in the river, it was found desirable to change the location of the log chute from the place provided in the contract. Such change facilitated the handling of logs.

With the exception of the commencement of this action, and one in 1899 that was shortly afterwards voluntarily dismissed by the city, it has never questioned the validity of the contract of 1877, and in reliance upon it the *Improvement Company* and its lessees, in addition to the cost of the dam, have expended over half a million dollars in improvements, the value of which is almost wholly dependent upon the maintenance and operation of the dam as used at the time of the commencement of the action, the water-wheels and power developed being dependent upon a twenty-six foot head. Neither the removal of the flash-boards nor the opening of the lock would be of any benefit to the city or to any one and would greatly injure the property of plaintiffs and their lessees. The removal of the flash-boards would injuriously affect the waterworks of the city by rendering a complete reconstruction thereof necessary if the head were reduced to eighteen feet. In 1905 the city joined with the

plaintiffs in an effort to secure legislative permission to maintain a dam of thirty-two feet, and since the city has acquired ownership of its waterworks system in 1909 its superintendent has insisted upon the maintenance of the head produced by the flash-boards in order to properly operate the city's water-power plant. The loss by a reduction of the head to eighteen feet would total hundreds of thousands of dollars to the parties interested in the water power.

As to the changes made by the flash-boards and the closing up of the lock, the plaintiff and its lessees acted in the belief that the city consented to and encouraged such action; that it was beneficial to the public and not contrary to the best interests of either the city or the state, and that neither would ever object to the same. The *Improvement Company* has always maintained sufficient slides and chutes for all logs and forest products and other craft and has always freely and expeditiously passed them over the dam.

Except as to increasing the head of the water by the use of flash-boards, utilizing the lock for mill purposes, and converting the old slide formerly existing on the west side of said lock into a flume, the *Improvement Company* has made no changes in the construction or plan of the dam otherwise than from time to time to reinforce and strengthen it.

Some of the defendants are creditors of some of the lessees of power, and the property rights in question constitute a substantial portion of their security for the payment of the bonds held by them.

In August, 1906, the city served notice upon the *Improvement Company* claiming it was in default because the dam was maintained at an excessive height; that it had been changed so as to obstruct navigation; that the lock had been converted to private use; that sufficient chutes for the passage of timber products had not been maintained, and other defaults not material upon the appeal; that if these alleged defaults continued for more than thirty days after notice the city would exercise its right under the contract of 1877 to

declare a forfeiture. To prevent the declaration of any forfeiture and to establish the rights of the parties under the contract this action was begun.

The conclusions of law of the trial court were to the effect: (1) The contract between the *Improvement Company* and the city, dated February 17, 1877, was and is a valid and subsisting contract. (2) The non-execution of the lease provided for in the contract does not affect the rights of the parties; they stand in the same relation they would have stood had the lease been executed. (3) The acts of the *Improvement Company* and the *Dells Paper & Pulp Company* in increasing the head of water created by the dam by the use of flash-boards on its crest, and in closing the lock and log chute by constructing a pulp mill in and over the lock, and using such chute for a flume, were in violation of the terms of the contract of 1877, and, if unexcused, constituted breaches of such contract. (4) The rights of the city to enforce forfeiture under said contract because of the acts of the plaintiffs mentioned in the next preceding finding have all been waived by the city and it has become estopped from complaining of any such acts. (5) That, relying upon such waiver by the city, plaintiffs and other lessees have expended large sums of money, the investment of which would be largely lost if the city should be permitted to enforce the conditions of the contract, and "said city is estopped from complaining of the closing of the lock or closing of the log chute or of the use on the dam of flash-boards of the height of eight feet, *so long as to each of said practices as the state shall not actually compel the discontinuance of the flash-boards and the opening of said lock and log chute,* and from declaring or attempting to declare the rights of either of the plaintiffs or of the Chippewa Valley Railway, Light & Power Company, or the rights of those claiming under or through either of said companies, forfeited because of any breaches of the terms of said contract hereinbefore mentioned." (6) The plaintiffs and the defendant Chippewa

Valley Railway, Light & Power Company are entitled to a judgment enjoining the city of *Eau Claire* from complaining of the use of flash-boards of the height of eight feet, from complaining of the use of the lock for pulp-mill purposes, and from in any manner interfering with any such uses, *and from inducing or influencing state officials or any other persons to complain of or to interfere with such uses,* and from declaring said contract of February 17, 1877, void, and from attempting to so declare, and from declaring any of the rights of either of the plaintiffs or of the Chippewa Valley Railway, Light & Power Company under said contract forfeited for or on account of the continuance of such use of flash-boards, such use of the lock, or such use of the log chute, *so long as to each of said uses as the state shall not actually compel the discontinuance of the same.*

(7) "The plaintiff *Eau Claire Dells Improvement Company* and its tenants are entitled to the possession and use of the dam described in the complaint and of the accumulation of water impounded thereby for the full term of ninety-nine years provided for by said contract of February 17, 1877, but subject to the provisions of said contract in so far as the same has not been waived or said city become estopped from claiming the right to enforce the same as hereinbefore found, and the plaintiffs and the defendant Chippewa Valley Railway, Light & Power Company are entitled to a judgment enjoining the city of *Eau Claire* from taking possession of said dam, accumulation of water, improvements or works, and from in any manner interfering with the same or with the exercise of the rights of the plaintiff *Eau Claire Dells Improvement Company* or its tenants in respect thereto for or on account of any alleged breaches of said contract involved in this action or the continuance thereof as hereinbefore set forth."

From a judgment entered accordingly, and dismissing the city's cross-complaint, the city appealed, and the plaintiffs appealed from those portions of the judgment set out in italics in conclusions (5) and (6) above.

For the plaintiffs there was a brief by *C. T. Bundy* and

P. M. Beach, both of Eau Claire, and oral argument by *Mr. Bundy.*

John B. Fleming, corporation counsel, and *A. H. Shoemaker,* both of Eau Claire, attorneys, and *Harry L. Butler* of Madison, of counsel, for the defendant.

The following opinion was filed July 17, 1920:

VINJE, J. The city has twelve assignments of error, but they may all be grouped into three main divisions, as many of them relate to the question of estoppel or waiver, and others become immaterial if the facts found by the trial court are sustained. We shall spend no time discussing the attack upon the findings of fact further than to state they are well sustained by the evidence and must stand as verities in treating the legal questions arising therefrom.

The city claims the trial court erred in finding and adjudging (1) that the contract of 1877 was and is a valid and subsisting contract; (2) that the city has waived the right to enforce and has become estopped to assert the forfeiture clause of the contract, if valid; and (3) in restraining the city from inducing or influencing state officials or inducing or influencing any other persons to complain of or interfere with the uses of the dam sanctioned by the court.

In spite of the fact that the city executed the contract, which both parties agree was tantamount to the execution of a lease as therein provided, over forty years ago, has received the rent thereunder and all the benefits of the contract for that period, it now seeks to invalidate it and receive the further benefits of acquiring the dam and all the water-power properties connected therewith free of charge because it did not have the legal capacity to execute the contract. This claim, though highly repellent to a court of equity, must nevertheless be met as a question of law. It is claimed there is no authority given the city to lease the dam itself; that the provision in sec. 3 authorizing the city to lease any surplus water power for manufacturing pur-

poses and to "let, lease, and rent any of the piers, booms, or other structures which may be constructed or erected under the provisions of this act," does not include the dam. Plaintiffs argue that the dam is a structure and is therefore specifically included in the term "other structures." They also claim that there is no necessity for direct legislative authority to lease the dam, and this claim appeals more strongly to us. The main purpose of ch. 231, Laws 1876, was to provide a waterworks system for the city. *State v. Eau Claire,* 40 Wis. 533. In operating a waterworks system a city acts in a proprietary and not in a governmental capacity. *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730; *State Journal P. Co. v. Madison,* 148 Wis. 396, 134 N. W. 909; *Nemet v. Kenosha,* 169 Wis. 379, 172 N. W. 711. Acting in a proprietary capacity it may, generally speaking, exercise such powers as a private concern engaged in a like business may exercise; for in their business matters municipal corporations are governed by very much the same rules as private corporations. *Schneider v. Menasha,* 118 Wis. 298, 305, 95 N. W. 94; *Omaha W. Co. v. Omaha,* 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. N. S. 736; *Biddeford v. Yates,* 104 Me. 506, 72 Atl. 335; *Little Falls E. & W. Co. v. Little Falls,* 102 Fed. 663. Therefore, wholly irrespective of direct legislative authority, the city could contract to have another do that which it could do in its proprietary capacity, namely, build and operate the dam for waterworks purposes. Not having the funds itself, it could lawfully contract with the *Improvement Company* to furnish the same and secure the latter for its reimbursement by a lease of the dam and so much of the water power as the city did not need for its purposes.

It was specially authorized to lease the excess water power for manufacturing purposes. This provision of the act was no doubt induced by the fact that such leasing, except as an incident to a municipal purpose, is not within the scope of a municipality. *Attorney General v. Eau Claire,* 37 Wis. 400.

So, also, special provision was made for authority to lease such piers, booms, and other structures as shall be sufficient for protecting and preserving the navigability of the river. If the dam was constructed, these would be a necessary incident thereto in order to preserve the public right of navigation, and so special grant to transmit the discharge of such public duties to lessees was secured. It follows that no duties devolving upon the city have been unlawfully delegated to the *Improvement Company,* and that it had authority to lease the dam.

It is next urged that the city had no right to lease the dam for ninety-nine years and thus to deprive itself of the use of the excess water power and other rights incident to the operation and control of the dam. Two considerations minimize the effect of this claim. The first is that, as already pointed out, only proprietary and not public rights are parted with; and the second and main one is that the chief purpose of the authority given the city to build and maintain the dam was to enable it to operate a municipal waterworks system. This purpose the contract carefully guards by reserving to the city so much water power as may be necessary to operate its waterworks. Since its waterworks system was installed it has had such power. No complaint is made and sustained that sufficient power has not been furnished it in the past or that it will not be furnished in future. This being the main purpose and this having been secured, and being made safe by the forfeiture clause in the contract, it is not so material what becomes of the incidents of the legislative grant, namely, the use of the excess power. It may be from the present viewpoint, more than forty years after the contract has been in effect, that it could be said the city made an improvident contract. But it cannot be said that good judgment would have so pronounced at the time it was made. But be that as it may, it was entered into in good faith, without fraud, in furtherance of the legislative purpose, and in a proprietary capacity.

In such capacity it is deemed competent for a municipality as well as for a private individual to make a valid improvident contract.

While leases for ninety-nine years were not common in this state, or perhaps in the United States, at the time this lease was made, they have become much more so and have uniformly been sustained so far as mere duration of time is concerned. Our court held that trustees could make a valid lease for ninety-nine years though it far exceeded the trust period and was tantamount to a conveyance so far as the remainderman was concerned. *Upham v. Plankinton,* 152 Wis. 275, 140 N. W. 5. In *Bailey v. Philadelphia,* 184 Pa. St. 594, 39 Atl. 494, a city's lease of its gas plant for a long term of years was upheld, and in *Little Falls E. & W. Co. v. Little Falls,* 102 Fed. 663, a lease of thirty years for supplying the city with water was sustained.

Sec. 9 of the act of 1876 provides that the common council of the city of *Eau Claire* "may issue the bonds of said city for the purpose of constructing the waterworks authorized by this act, not exceeding one hundred thousand dollars in amount, at such times as it may determine." The city did issue bonds in the amount of $95,000 which it turned over to the *Improvement Company* as part payment for the construction of the dam and which netted the *Improvement Company* $81,000. It is argued it was the legislative intent that the total expenditure by the city in cash or otherwise was limited to $100,000, and since the amount of the bonds given the *Improvement Company* plus the value of the excess power for ninety-nine years greatly exceeded $100,000, the city has passed the limit fixed by the legislature for the construction of the dam. In view of the actual situation confronting the city and the legislature, it is not reasonable to believe that it was the legislative intent that no more than $100,000 should be spent in building the dam. The dam and works necessarily connected therewith to preserve navigation cost approximately $300,000. It was built

by the *Improvement Company* for itself shortly after the act was passed, and there is no evidence that such cost was not a necessary and reasonable one. In view of that, we think the legislative intent was to limit the bonded indebtedness of the city on account of the dam to $100,000, but not to limit the cost of the dam to such sum.

Sec. 10 of the act of 1876 provides that "All moneys which shall be received for the lease of water-power flowage, . . . water rents, piers and booms, and any other source or sources arising from any of the works authorized by this act, shall be applied to the purpose of keeping said works in repair, payment of the interest upon the bonds . . . and for creating a sinking fund for the ultimate redemption thereof." The contract, it is claimed, violates this provision of the act because it does not produce the revenue contemplated and that which is produced is not applied to the uses prescribed. It must be admitted that the language of the section is more compatible with a situation where the city operates the dam than with one where it leases it. But it is not inconsistent with a lease thereof. In so far as the rentals from the dam and works are concerned, they go to keep the same in repair, for that is a duty charged upon the *Improvement Company* by the contract. If the city has not applied water rents to the required purpose that is no concern of plaintiffs and cannot, therefore, invalidate their contract with the city, for they have nothing to do with the application of the water rentals. If the city has failed to apply them as the act provides, it cannot charge its default up to plaintiffs.

The last attack made upon the contract is that certain aldermen who voted for the contract were interested in the *Improvement Company*. The court found this not to be the fact, and the evidence sustains the finding and that disposes of the question.

Perhaps the stress of the case rests upon the question whether the trial court erred in finding that the city by its

conduct had waived the forfeiture clause as to breaches already incurred and was estopped from asserting the same. It is conceded by the plaintiffs that the raising of the dam eight feet by the use of flash-boards, the closing up of the chute, and the use of the lock for a paper mill, constituted a breach of the contract, but it is claimed the city has waived such breach, and that owing to the reliance of plaintiffs upon such waiver and other conduct of the city and the irreparable injury that would now result to plaintiffs by reason of having expended large sums of money on the strength of the city's conduct and waiver, the city is estopped from asserting the forfeiture clause of the contract. Waiver is generally defined as the voluntary relinquishment of a known right, and it may be a defense though no detriment to the adverse party is shown. In estoppel *in pais* the element of loss or detriment to the adverse party must appear. In asserting an estoppel the existence of the truth of the fact complained of is not denied, but the right of the other party to complain thereof is denied because the previous conduct of such party has caused the party asserting the estoppel in good faith to change his position in such a way that loss would ensue to him if the estoppel cannot be effectively interposed. Conduct may be positive or negative. Thus silence, where there is a duty to speak, may constitute an estoppel *in pais*. 10 Ruling Case Law, 706. So, also, the fact that some one else may have a right to complain is immaterial. The question is, Can the party against whom the estoppel is asserted complain? In the case at bar the conduct of the city for many years was relied upon by plaintiffs, and because of such conduct they made valuable improvements that would inure to the benefit of the city if its position is well taken. It would therefore seem to be a case where estoppel rather than waiver or acquiescence covers the whole case. In other words, if the conclusions of the trial court are correct, the city by its conduct induced plaint-

iffs to change their position to their loss unless such conduct can be asserted by way of estoppel.

The gist of the argument of the city is to the effect that, since the acts complained of were forbidden by the legislative enactment authorizing the city to build the dam, the city by waiver or conduct could not validate such acts; that they were and remain invalid in spite of anything the city said or did or can say or do now. They were prohibited by the legislature, therefore the city had no power to authorize them in the first instance, and, having no power to authorize them, it has no power to ratify them because the power to ratify presumes the power to perform the act ratified. If estoppel cannot be successfully asserted by plaintiffs unless they can justify their acts under the law of 1876, then the logic is good. But the estoppel invoked has no relation to the legislative act. It rests upon the contract made between the parties. Such contract could have been made without a forfeiture clause at all. In that event no forfeiture could be asserted by the city, though it might perhaps be by the state. But the state is not a party to this action, and no right that it may have in reference to the subject matter can be affected by the decision herein. The estoppel invoked is against the contract provision and not against the legislative franchise. The gravamen of plaintiffs' case is to restrain the city from enforcing the forfeiture clause of the contract because of its conduct. And the sole question now for decision is, Has the city estopped itself from enforcing the forfeiture feature of its contract? As to that it is immaterial, as before stated, that some one else may have a right to complain. In solving this question the same rules and principles apply that would apply if all the acts complained of were lawful but were within the forfeiture clause. Plaintiffs are not seeking to have their acts legalized by or through the conduct of the city, for this they cannot do. But they are saying to the city that, Be our acts lawful or

unlawful, you have no right to complain thereof, because you have not only silently acquiesced therein with knowledge of all the facts, but you have actively encouraged and permitted us to make these valuable improvements, and you are therefore estopped to forfeit the contract through conduct permitted and encouraged by you and resulting indirectly to your benefit through building up your city as a manufacturing center and adding hundreds of thousands of dollars to your tax roll.

Upon the former appeal (134 Wis. 548, 115 N. W. 155) it was decided that the assertion of the forfeiture rested upon contractual rights between the parties. Bearing this in mind, and bearing in mind that the contractual rights spring from a proprietary and not from a governmental exercise of municipal power, it follows that estoppel can be urged against the city upon the same grounds and sustained by the same proof that is essential against a private person. *Kneeland v. Gilman,* 24 Wis. 39; *Houfe v. Fulton,* 34 Wis. 608; *Lawrence v. American W. P. Co.* 144 Wis. 556, 128 N. W. 440; *Beadles v. Smyser,* 209 U. S. 393, 28 Sup. Ct. 522, 52 L. Ed. 849; *Fredonia v. Fredonia N. G. L. Co.* 84 Misc. 150, 145 N. Y. Supp. 820; 19 Ruling Case Law, 1002 *et seq.* In *Houfe v. Fulton,* 34 Wis. 608, 618, the court said concerning a municipal corporation:

"It is now well settled that as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons."

This was said in a case where a town was held estopped to deny the existence of a highway and related, therefore, to a governmental function. Whether this doctrine has been limited by *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 81 N. W. 1101, by requiring clearer proof of estoppel in case of the exercise of governmental powers, need not now be discussed, for it is certain that it has not been limited as to

estoppel against municipal corporations in the exercise of their proprietary powers.

It should also be borne in mind that under the evidence in this case and the facts found by the court to the effect that the navigability of the Chippewa river has not been materially affected or diminished by the acts of plaintiffs, nor has any person suffered damage thereby, such acts are not unlawful and do not *per se* constitute a nuisance though without legislative permission. *A. C. Conn Co. v. Little Suamico L. M. Co.* 74 Wis. 652, 43 N. W. 660; *Charnley v. Shawano W. P. & R. I. Co.* 109 Wis. 563, 85 N. W. 507; *Allaby v. Mauston E. S. Co.* 135 Wis. 345, 116 N. W. 4.

Bearing these principles and facts in mind, let us briefly examine the salient conduct of the city tending to sustain the finding of estoppel. First and foremost is the fact that every change made by plaintiffs in the use of the dam was known to the city at the time or shortly after it was made, and no protest was made until about 1905 or 1906, some ten years after the last radical change was made by closing up the lock and building the pulp mill therein. The building of such mill, the court finds, was done by reason of the consent and encouragement of individual aldermen and the unofficial action of the common council. The flash-boards had been maintained for over twenty years and at the present height for a number of years before this action was begun; and since 1909 the city's waterworks superintendent had insisted upon having a head of twenty-six feet, which could be had only by the use of flash-boards, as the city well knew. The evidence also discloses at least fourteen acts or declarations of the common council or of the mayor encouraging the development of the water power of the dam; the giving of bonuses aggregating over $50,000 to factories using power; the giving of bonuses to factory employees; the remission of taxes on manufacturing plants using power from the dam. These acts and declarations began as early as

1880 and continued until 1896. The city had also in 1905 joined with the plaintiffs in attempting to secure legislation permitting a thirty-two foot head, thus evincing the fact that it was interested in and desired the use of all the power that could be developed from the dam.

In view of the fact that the uses complained of have not affected the navigability of the river for such purposes as it is practically navigable; that they have not injured the city or third parties; that the city, from the very inception of the completion of the dam until a short time before this action was begun, not only silently permitted the uses complained of but actively encouraged them; that in reliance upon such permission and encouragement by the city plaintiffs have in good faith spent hundreds of thousands of dollars in improvements that would inure to the benefit of the city if it could insist upon the forfeiture, it is deemed that the trial court reached the correct conclusion when it restrained the city from now enforcing the forfeiture.

The court also enjoined the city "from inducing or influencing state officials or any other persons to complain of or interfere with such uses," referring to the use of eight-foot flash-boards, the use of the lock for pulp-mill purposes, and the closing up of the log chute. In so doing we think the court erred, not perhaps because of lack of power so to do, but because not essential to the protection of plaintiffs' rights and because of a needlessly harsh inhibition upon public officials. If the facts be as the court found them and as we deem them to be from the evidence, the uses complained of do not harm the state or any one. If they do not in fact harm the state, it is not to be assumed that it will arbitrarily destroy valuable property belonging to its citizens and from which it and its municipalities derive substantial taxes just because technically it may have the power so to do—a question not here decided. This court will assume that if the state is ever called upon to act in this mat-

ter it will not only act lawfully but also equitably as to all parties concerned. On the other hand, if it can be shown that the uses complained of are detrimental to the state, then the privilege, if not the duty, of any citizen to call such detrimental uses to the attention of the state should not be withheld.

Upon the city's appeal the amended judgment is modified by striking out from paragraph 12 thereof the words "and from inducing or influencing state officials or any other persons to complain of or to interfere with such uses," and as so modified is affirmed.

The plaintiffs appeal from that part of the judgment found in paragraphs 11 and 12 estopping the city from complaining of the uses therein mentioned *"so long as to each of said practices as the state shall not actually compel the discontinuance of the flash-boards and the opening of said lock and log chute,"* as expressed in paragraph 11, and *"so long as to each of said uses as the state shall not actually compel the discontinuance of the same,"* as expressed in paragraph 12 thereof, because it limited the binding effect of the estoppel to the time when the state may successfully act, thus permitting the city, in that event, to enforce a forfeiture for past breaches. We think the court erred in so limiting the effect of the estoppel, and the paragraphs above quoted will be stricken out and the following paragraph inserted in the place of each: "provided, however, that in the event the state can and shall hereafter lawfully direct or require the discontinuance of such uses, or any of them, then the injunction herein granted shall not be held to restrain the city of *Eau Claire* from declaring a forfeiture in case they or any of them are continued beyond the time then lawfully fixed for their discontinuance." This will protect plaintiffs against a forfeiture for all breaches prior to the time fixed by the state, if it can and shall lawfully fix a time, for a change in the use of the dam and works, and will leave

the city in a position to protect its interests as they may hereinafter be affected by state action. As so modified the judgment is affirmed.

By the Court.—Judgment modified as expressed in the opinion herein, and as so modified is affirmed, with costs to plaintiffs.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

JACKY, Administrator, Appellant, vs. MCADOO, Director General of Railroads, Respondent.

April 7—September 25, 1920.

Railroads: Person crossing track on station grounds: Contributory negligence.

1. Where a wife, who was at a railroad station to meet her husband, on hearing a locomotive whistle walked out on the platform and saw a train in the yards on tracks that were curved so that she could not tell which track it was on, assumed it was coming on the fourth track whereas it was on the first, and was struck when attempting to pass through a gate in a fence between two tracks, without looking in the direction from which the train was coming, her administrator cannot recover for her death, as she was guilty of contributory negligence as a matter of law in failing to look or listen for a train before entering upon the track.
2. A traveler is not excused from exercising vigilance to discern whether a track is clear, and cannot assume the absence of danger because a gateway leading to the track is open.

ESCHWEILER and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover damages for the death of plaintiff's intestate caused about 4 o'clock p. m. May 18, 1918, by being struck by defendant's train as it arrived at the depot at Fond du Lac. There is a principal station and a substation

separated by a picket fence in which there is a gâte. This fence and gate separate tracks 1 and 2 and prevent passengers from passing over tracks 2 to 4 when trains arrive. On the day in question the deceased with her son came to the depot to meet her husband, who was to arrive on a train entering the depot on the fourth track. She was well acquainted with the depot, tracks, and surroundings, as she had lived in Fond du Lac for some time and had frequently been to the depot to meet her husband and as a passenger. On hearing an approaching train from the north she walked to the south to a point opposite the gate, which was open, and onto or near track 1, just in front of the train, without looking, and was struck and killed. The jury found that (1) defendant did not use ordinary care in leaving the gate open; (2) such want of ordinary care was the proximate cause of the injury; (3) deceased used ordinary care in not looking to see if a train was on track 1 coming from the north immediately before starting to cross such track; and (4) damages in the sum of $3,000. The court upon motion changed the answer to question 3 from "Yes" to "No" and entered judgment for defendant. The plaintiff appealed.

For the appellant there was a brief by *Reilly & O'Brien* of Fond du Lac, and oral argument by *J. E. O'Brien.*

R. N. Van Doren of Milwaukee, for the respondent.

The following opinion was filed June 1, 1920:

VINJE, J. Did the court err in changing the answer to question 3 from "Yes" to "No," thus finding the deceased guilty of contributory negligence as a matter of law by entering upon track 1 without looking or listening for an approaching train? The trial court has so fully and tersely stated the evidence relative to the question that we embody its statement thereof. The court says:

"The facts of the case are undisputed and clearly established by credible witnesses. The deceased was at the depot to meet her husband, who was coming on a train which was

to enter the depot grounds from the north on the fourth track from the depot. The train was fifteen to twenty minutes late. The intestate knew these facts and probably knew the further facts that this train was the train scheduled for the first arrival, and that another train was scheduled for arrival from the north on the first track from the depot fifteen or twenty minutes later, although there is no direct evidence that she knew the two facts last stated. On the train from the north whistling, the deceased remarked to her son that the train was coming, and walked through the depot and out of the door onto the depot platform. On reaching the platform she looked to the north and saw the approaching train a considerable distance up the yards. The tracks curved so that it was impossible for her to see on which track the train was coming in. She evidently assumed it was coming on the fourth track, whereas it was coming in on the first. Between the first and second tracks was a fence, and in this fence was a gate, which was customarily and according to orders kept shut during the time of the afternoon train arrivals. Whether the intestate knew this or not does not appear. This gate was open at the time involved. The intestate, on seeing the approaching train as stated, turned south and walked slowly for about sixty feet down the platform, passing along four or five feet east of the east rail of the first track. On reaching a point opposite the open gate she turned to the west, manifestly to cross the track through the open gate, and, without looking back or turning her head at all to see if the track to the north was clear, stepped immediately in front of the approaching train. This train was three or four minutes ahead of its schedule time. Whether intestate knew the schedule time of this train does not appear. She was about fifty-two years of age, with ordinary senses of sight and hearing. The engine bell was ringing and the engine and train were making ordinary noises of operation as the train approached. These are all the facts that have any material bearing upon the question of contributory negligence."

To this statement should be added the fact that when the intestate and her son first heard the train the son remarked, "I think the train is coming now," to which she replied, "Do you think it is the train?"—indicating that she was uncer-

tain as to which train was coming. This uncertainty she did not take the precaution to resolve before she was struck by the train. The trial court concluded that under the rule in *Walters v. C., M. & St. P. R. Co.* 104 Wis. 251, 80 N. W. 451; *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148; *Hains v. Johnson,* 154 Wis. 648, 143 N. W. 653; *Meissner v. Southern Wis. R. Co.* 160 Wis. 507, 152 N. W. 291; *Smith v. C. & N. W. R. Co.* 161 Wis. 560, 154 N. W. 623; and *Prince v. C. & N. W. R. Co.* 165 Wis. 212, 161 N. W. 765, the deceased was guilty of contributory negligence as a matter of law in failing to look or listen for a train before entering upon track 1. The conclusion reached is sustained by the cases cited and many others referred to in the *Meissner Case,* on page 509.

Plaintiff argues that the deceased, upon hearing the train whistle, reached the conclusion that it was the one she desired to meet; that she acted upon such conclusion, and upon seeing the open gate thought there was no danger from moving trains and had a right to so conclude and think. This is not the law. She made no adequate observation to determine what train came in. She had no right to assume absence of all danger by reason of the open gateway. In *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 150, 133 N. W. 148, the court says:

"Even such a persuasive circumstance as gates being raised, where such exist and are customarily let down to bar the way to the track when a train is about to pass, has been held not to excuse a traveler on foot from using, efficiently, his own faculties to discern whether the track is clear before entering upon it," citing *White v. C. & N. W. R. Co.* 102 Wis. 489, 78 N. W. 585, and *Walters v. C., M. & St. P. R. Co.* 104 Wis. 251, 80 N. W. 451.

It is evident that had deceased taken one look to the north before she came within the danger zone of track 1, she could have avoided injury. Failing to do so she was negligent.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). I think the situation the deceased was in as a licensee upon the grounds of the defendant is so substantially different from that of a person traveling on a highway and governed by different legal rules that the question of the contributory negligence of deceased was properly one for jury determination.

I am authorized to state that Mr. Justice OWEN agrees with me in this dissent.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

TILL, Plaintiff in error, vs. THE STATE, Defendant in error.

April 10—September 25, 1920.

Physicians and surgeons: Practicing without license: Receiving payment by subterfuge: Prescription of family remedies: Criminal law: Intent: Evidence: Prior treatments of same person: Denial of continuance: Discretion of court.

1. Where on the trial of defendant for practicing medicine without a license there was evidence that he had treated a child on former occasions, the jury were not bound by the declaration in a card signed by the child's mother and by defendant's testimony that the treatment was gratuitous and that the charge made was only for medicine furnished, but could find that the card and the sale of the medicine was a mere subterfuge to avoid the prohibition of sec. 1435*h*, Stats.
2. Sec. 1435*j*, Stats., excepting from the requirement of a license to practice medicine the gratuitous prescribing and administering of family remedies, does not permit engaging in the prescription of family remedies as a business.
3. Where the affidavit supporting a motion for the continuance of the trial of the accused alleged that a material witness was with the American Expeditionary Forces in France, that he would testify to certain facts which it developed upon the trial were immaterial to the issue, and would also testify that defendant was not practicing medicine—which would be incompetent,—without showing any ground for a belief that the witness could be present at the next term of court, it was not an abuse of the court's discretion to deny the continuance.

4. Evidence of treatments of a child prior to the treatment alleged in the information is admissible to show intent, and particularly to negative the provision of sec. 1435*j*, Stats., excepting treatment rendered in an emergency.

ERROR to review a judgment of the circuit court for Barron county: W. R. FOLEY, Circuit Judge. *Affirmed.*

The information charges that the defendant did on June 20, 1917, unlawfully practice medicine and attempt, undertake, and hold himself out as being authorized to practice medicine, and did then and there prescribe directions for medical treatment for the cure and relief of bodily diseases, without first having obtained a license, etc. The jury found the defendant guilty, and from judgment upon the verdict the defendant appeals.

Elmore T. Elver of Madison and *George B. Skogmo* of River Falls, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, J. F. Baker,* assistant attorney general, and *J. L. Dahl,* district attorney of Barron county, attorneys, and *A. C. Umbreit* of Milwaukee, of counsel; and the cause was argued orally by *Mr. Umbreit* and *Mr. Baker.*

The following opinion was filed May 4, 1920:

ROSENBERRY, J. The evidence offered on behalf of the state tended to show that on the 20th day of June, 1917, Mrs. Thomas Thompson went to the home of *John Till,* taking with her her little girl, who was ill; that the visit on June 20th was the third visit which had been made to *John Till* for the same purpose, one visit having been made in November, 1916, and one in February, 1917; that at the time of the visit she entered the home of *Till* and was conducted to the women's waiting room, where she was met by a helper of the defendant, who presented her a card as follows:

"Taking upon myself all risk involved and absolving *John Till* from any and all claims for damages arising out

of anything that he may do or omit to do in reference to and connection with in caring for or nursing for myself or my ailments, I request *John* to examine into my physical condition, and as a matter of humanity and benevolence (*although he does not claim to be a member of any profession*) to attempt in his own way and by such means and agencies as he may deem best, the nursing and caring for, and if possible the cure of, my ailments. I appreciate the fact that nursing and relief or curative treatment and nursing sometime occasion pain. I make this application for help of my own free will. No enticement has been used as far as I am concerned. I am acting in good faith;"

that she signed the card and gave it with twenty-five cents to the helper; that after this preliminary she was admitted with her sick child to *Till's* office, where he examined the child, gave her medicine with directions for its use, one dollar being paid for the medicine, after which she left the premises. The witness was permitted to testify to similar occurrences on the occasion of her visit in November, 1916, and in February, 1917. On the occasion of each visit numerous persons were in waiting, some in the men's waiting room and some in the women's waiting room. These persons received medicines or had plasters placed upon their backs.

It is claimed by the state that this evidence warranted the conviction of the defendant for practicing medicine without a license in violation of sec. 1435*h*, Stats., the material part of which is as follows:

". . . Any person beginning the practice of, or attempting, undertaking or holding himself out as being authorized to practice medicine, surgery, or osteopathy without having a license so to practice, or any other form or system of treating the afflicted without having a certificate of registration authorizing such practice . . . shall be guilty of a misdemeanor. . . ."

Sec. 1435*j* provides:

"The provisions of sections 1435*a* to 1435*i*, inclusive, shall not apply to commissioned surgeons of the army and

navy, or of the public health service of the United States, or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state or to the gratuitous prescribing and administering of family remedies or treatment rendered in an emergency."

It is contended on behalf of the defendant that inasmuch as he did not hold himself out as a doctor, and rendered his services gratuitously, he was not practicing medicine, and so not required to have a license. It appeared from the testimony that on the 20th day of June the defendant put his hand beside the child's ear, said that she had infantile paralysis caused by the stomach, and that he would give her some medicine, directing that the medicine be given to her one-half teaspoonful three times a day; and that she should be rubbed with liniment every evening, and should return in a month. This performance was repeated substantially on the occasion of each visit. It is claimed that the twenty-five cents paid the helper at the time the card was signed and the dollar paid after the advice was given was for medicine and not for the advice. We think the jury was not bound by the declaration contained in the card that the services which *Till* did were rendered as a matter of humanity and benevolence, and that the jury might properly find, as it must have done, that the card and the sale of the medicine was a mere subterfuge and an attempt to avoid the prohibition of the statute. The case of *Comm. v. St. Pierre*, 175 Mass. 48, 55 N. E. 482, is cited. We think that case not applicable to the facts in this case. The judgment in that case was reversed because evidence offered on behalf of the defendant that he did not hold himself out to be a doctor and did not charge anything for his services was excluded. Evidence offered on behalf of the defendant in this case was received, and the question was for the jury upon the whole case.

We are further of the opinion that the claim of the de-

fendant that he was within the provisions of sec. 1435*j* relating to the gratuitous prescribing and administering of family remedies, cannot be sustained. While it does not appear what the exact nature of the medicine furnished the patient was, the statute is certainly not intended to permit of the prescription of family remedies as a business, and the treatment was certainly not rendered in an emergency.

The action was called for trial at the May, 1919, term, at which time the defendant made a motion for a continuance, which was denied. The denial of this motion, it is contended, constitutes error. The affidavit upon which the motion was based includes an affidavit of merits, alleges that the defendant has used due diligence to prepare for trial; that he has attempted to procure the attendance of Albert Kuhn and Hon. Clarence C. Coe at the trial; that the said Kuhn is a member of the American Expeditionary Forces in France; that the said Coe is a member of the Wisconsin legislature; that on account of Kuhn's absence it is impossible to produce him at the trial; that the said Coe refuses to attend the trial on account of his duties as a member of the Wisconsin legislature; that Kuhn and Coe are necessary and material witnesses. without whom he cannot safely proceed to trial; that he has fully and completely stated to the counsel the facts he expects to prove by the said witnesses, and he is advised that he cannot safely proceed to trial without them; and that said witnesses are not absent by the connivance or procurement of the defendant. The defendant further alleges that he expects to prove by Albert Kuhn that Thomas Thompson paid no money to the defendant for a certain card, as testified to by said Thompson, upon which testimony the warrant in this case was issued; that if said card transaction occurred it was alone between said Thompson and said Kuhn, at a time when said defendant was not present; that he expects to prove by said Albert Kuhn that no money was ever paid to the defendant for giving treat-

ment or for the practicing of medicine upon said Thomas Thompson; and that he expects further to prove by the said Kuhn that no medicine was ever given to the said Thomas Thompson, and that no medicine was sent to said Thomas Thompson, and that defendant was not engaged in the practice of medicine on the 20th day of June, 1917. It is further alleged that said Kuhn is familiar with all the facts surrounding the case; and that said Coe assisted in the preparation of the case for trial; and that he cannot specifically state what he expects to prove by said Coe, but that his testimony will be important by way of impeachment.

The witness Kuhn was a member of the American Expeditionary Forces, then in France. The case was tried in May, 1919. The next term of the Barron county circuit court was at the November, 1919, term. No facts are given or information suggested tending in any way to support the bare allegation contained in the affidavit that if a continuance were granted the attendance of Kuhn at the next term of court could be procured. It does not appear that the defendant had any knowledge of his whereabouts, excepting that he was overseas, or was in communication with him, or that if he was discharged he would return to Barron county. It furthermore developed upon the trial that the facts as to which Kuhn could testify were not material to the issues as presented. No evidence was offered that Thomas Thompson had paid any money to the defendant or to any one for the defendant, or that any medicine was sent to Thompson or to his wife, and certainly Kuhn could not testify that the defendant was not engaged in the practice of medicine, which was the very question at issue in the case. The application was addressed to the sound discretion of the trial court, and we are of the opinion that the denial of the application for a continuance was not an abuse of that discretion. *Miller v. State,* 139 Wis. 57, 119 N. W. 850.

Evidence was admitted as to transactions had between

Mrs. Thompson and the defendant in November, 1916, and in February, 1917. It is alleged that the admission of this evidence was error within the rule laid down in *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185, and *Topolewski v. State,* 130 Wis. 244, 109 N. W. 1037. It is no doubt a settled rule of law that the commission of one offense cannot be established by proof of the commission of other offenses. Evidence as to the occurrences on the two prior occasions was not offered and received in this case for that purpose. The trial court said:

"To show the character of the act on June 20th which has been testified to, and as throwing some light on the question of whether or not the defendant was engaged in the practice of medicine, the testimony as to the transactions with the witness Mrs. Thompson on previous dates in connection with the visits of herself and little girl to the defendant, was admitted, not to prove that the defendant had committed some offense on other dates than June 20th, but to throw light on what the transaction on June 20th meant, and I think this evidence may be material for the same reason."

And in his instructions to the jury the court said:

"This evidence was admitted for the purpose of throwing some light on the character of the transaction and of the visit to the defendant on June 20, 1917, and not as proof of any violation of law by the defendant prior to June 20th."

So limited, this testimony was properly admitted. It certainly tends to characterize the services rendered by the defendant on June 20th. This is particularly true when considered in connection with the provision of the statute which permits the administering of remedies in cases of emergency. While it was not necessary, it was proper, for the state to negative any possible inference of that kind. It is properly admitted in this case for the purpose of negativing an innocent intent on the part of the defendant. 1 Wigmore, Evidence, § 302.

Upon the whole record we are convinced that the defendant had a fair trial and was properly convicted.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on September 25, 1920.

ETSCHEID and others, Respondents, vs. TIEFENTHALER and others, Appellants.

May 7—September 25, 1920.

Real-estate brokers: Agreement to divide commissions as creating partnership: Statute of frauds: Performance of contract of sale: Failure to pay note before maturity not default.

1. An agreement between real-estate agents to share commissions accruing from the sale of a specific parcel of real estate does not make them partners.
2. An agreement between such agents to divide profits arising from an exchange of property and the sale of that taken by one of the parties to the exchange does not create any estate or interest in or any trust or power over or concerning lands, nor is it a contract for the sale of any land or interest in land, so as to be affected by secs. 2302, 2304, Stats.
3. The invalidity of an oral contract by one who took land in exchange for other property to convey the land to parties designated by the real-estate agents on payment of the agents' note, does not invalidate an agreement between the agents for the division of the profits arising from the transaction after the owner had performed his contract to convey.
4. Where such real-estate agents gave their note for the purchase price of the land and agreed to share the profits arising from its resale, the failure of some of the agents to meet their share of the note before it was due, as requested by the others, does not deprive them of their share of the profits where the land was resold before the note became due, there being no actual default.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action between real-estate dealers for a division of commissions. In July, 1916, Warren G. Geib was the owner of

a farm in Kenosha county, Wisconsin, subject to mortgages aggregating in the neighborhood of $14,000. He listed it with one Floyd Fisher, a real-estate agent in the city of Milwaukee, with whom was associated *G. F. Etscheid,* for sale. The Atlas Investment Company owned a flat building at 822 Fond du Lac avenue in the city of Milwaukee subject to a mortgage of $10,000. It listed the flat building with *Alex. J. Tiefenthaler,* a real-estate dealer, for sale. *Tiefenthaler* spoke to the real-estate firm of Korthals, Henn & Kern concerning a sale of the flat building, and *Etscheid* likewise spoke to the same firm concerning the sale of the Geib farm. Later Fisher and *Etscheid,* agents for the farm, and *Tiefenthaler,* agent for the flat building, got together with the Korthals firm and agreed to bring about, if they could, an exchange of the farm for the flat. The Atlas Investment Company did not want the farm, but agreed that if they were paid $2,000 by *Tiefenthaler* and *Korthals* they would sell their equity in the flat building. An exchange of the farm for the flat building was brought about. The Atlas Investment Company took title to the farm. *Korthals* and *Etscheid* gave to the Atlas Company their promissory note for $2,000, payable ninety days from the date thereof. It was understood that upon the payment of the $2,000 the Atlas Investment Company would deed the farm to whomsoever directed. The agreement between the real-estate agents was that none of them should receive any commission from either of their respective clients in consummating the deal; that they would find a purchaser for the farm, pay the Atlas people the $2,000 coming to them, and divide the profits between them. Fisher was to have three ninths, the Korthals firm two ninths, *Tiefenthaler* two ninths, and *Etscheid* two ninths. The defendants arranged an exchange of the farm with one Charles Forster for $1,300 in cash and certain property on Galena street in the city of Milwaukee. The Atlas Investment Company deeded the farm to *Tiefenthaler, Tiefenthaler* deeded it to Forster, and Forster deeded

to *Tiefenthaler* his property on Galena street. *Tiefenthaler* then mortgaged said property to the Bohemian Building & Loan Association for $6,000. He thereafter gave a mortgage to one L. A. Zavitovsky for $3,000, so that in case he traded it for anything else the record would show that such additional mortgage was on said property, and immediately took from L. A. Zavitovsky a release of said mortgage. He received no money on the said latter mortgage.

The defendants refused to account to or pay plaintiffs their share of the profits resulting from these transactions, for the reason, as they claim, that *Etscheid* had failed to pay his part of the $2,000 note given to the Atlas Investment Company.

This action was brought by plaintiffs to recover their share of the profits resulting from the various transactions. The action was tried before a jury. At the close of plaintiffs' case the court dismissed said action as against the Atlas Investment Company. Both parties moved for a special verdict and submitted proposed questions to be included therein. The court submitted three questions suggested by the plaintiffs, in response to which the jury found that neither *Etscheid* nor Fisher agreed to give up their rights in the contract, and that the market value of the Galena-street property on November 10, 1916, was $9,500. The court made additional findings in which were found the facts as hereinbefore stated, and also that the bargain with Forster for an exchange of the farm for the Galena-street property was made on the 26th day of October, 1916, by the defendants, with the assistance of one Herman Tiefenthaler, a brother of the defendant *Alex. J. Tiefenthaler,* and that the sale was completed and the deeds obtained to the Galena-street property on or about the 10th day of November, 1916, all of which was done in conformity to and in carrying out the said agreement for division of profits, as already stated. The court then finds the amount of the profits resulting from the transaction, and awards plaintiffs judgment for their

portion thereof. From the judgment so rendered the defendants appealed.

For the appellants there was a brief by *L. A. Zavitovsky* and *Geo. A. Bowman,* attorneys, and *Henry S. Sloan,* of counsel, all of Milwaukee, and oral argument by *Mr. Bowman* and *Mr. Sloan.*

Adolph Kanneberg of Milwaukee, for the respondents.

The following opinion was filed June 1, 1920:

OWEN, J. Aside from challenging certain findings of fact, which we have considered and find sufficiently supported by the evidence, appellants' principal contention is that the contract between the parties constituting the basis of recovery is void because within the statute of frauds. Their argument on this proposition is grouped under the following heads: (a) the oral agreement between the parties was a partnership agreement; (b) the partnership agreement being oral and involving an interest in land is void under the statute of frauds; (c) the oral contract between Floyd Fisher, *Etscheid, Tiefenthaler,* and *Korthals* on the one hand and the Atlas Investment Company on the other hand is void and its specific performance cannot be enforced; and (d) the plaintiffs did not fully perform the conditions of the oral contract.

A general statement of our views with reference to the character and effect of the contract between plaintiffs and defendants, as well as the separate contract with the Atlas Investment Company, will suffice as a sufficient response to appellants' contentions. We do not regard the contract as constituting a partnership agreement. It was no more nor less than an agreement between real-estate agents to divide and share commissions in certain proportions accruing from the sale of a specific parcel of real estate—an arrangement very common among real-estate agents. To hold that this agreement constituted a partnership between the parties would be to say that every agreement between real-estate

agents for a division of commissions in the event of a sale of a specific parcel of real estate constituted such real-estate agents partners, a proposition which we apprehend is without support in reason or authority. Neither did it involve any interest in real estate within the meaning of secs. 2302 or 2304, Stats. It created no estate or interest in, nor any trust or power over or concerning, lands, nor was it a contract for the sale of any lands or any interest in land; so that, whether or not it was a partnership agreement, it was not affected by the statute of frauds. It may be assumed that the agreement between Fisher, *Etscheid, Tiefenthaler,* and *Korthals* on the one hand and the Atlas Investment Company on the other was within the statute of frauds. But in view of the fact that the Atlas Investment Company fully performed its part of the transaction; that this action is not for the specific performance of that contract, nor is the right of plaintiffs to recover in any respect based thereon, that circumstance has no bearing whatever upon the issues in this case.

The argument that the plaintiffs did not fully perform the conditions of the oral contract on their part and, consequently, are not in a position to recover in this action, is based on the fact that for some considerable time before the $2,000 note executed by *Korthals* and *Etscheid* to the Atlas Investment Company became due, *Korthals* and the defendants were continually urging the plaintiffs *Etscheid* and Fisher to meet their share of the note, and that because of their failure so to do they defaulted in carrying out their part of the contract. This contention falls when it is considered that there could be no default on the part of Fisher and *Etscheid* before the note became due, and, according to the finding of the court, based on sufficient evidence, this deal was consummated on the 26th day of October, while the note became due on the 2d day of November. The deal was consummated, therefore, one week before the note became due, hence there could be no default on the part of the

plaintiffs at the time the sale of the farm was arranged for. We see no error in the record.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

MILLER SAW-TRIMMER COMPANY, Appellant, vs. CHESHIRE and others, Respondents.

May 8—September 25, 1920.

Patents: Contract to assign future patents: Validity: Modification of contract: Consideration: Subject matter: Patented device forming integral part of new invention: Paper-feeding mechanism on printing press: Specific performance of contract: Estoppel.

1. Where plaintiff had a contract with defendant whereby the latter was to assign to plaintiff patents which might be issued to him for inventions relating to paper-feeding mechanism for printing presses, the refusal of plaintiff to assist defendant in developing a subsequent invention of a printing press did not estop it from claiming the right to the patent for the feeding mechanism on the new press because of the fact that the defendant exhibited a model of the new device to plaintiff, where such model showed no invention relating to the feeding and handling of paper and plaintiff had no knowledge that defendant would embody such mechanism in his new press.
2. The defendants, who had knowledge of the contract between the inventor and the plaintiff, proceeded at their peril, so far as the rights of the plaintiff were concerned, in developing an invention which related to paper-feeding and handling devices.
3. A contract whereby the inventor of such paper-feeding mechanism for a particular type of press assigned his patent to another and agreed to assign all future patents he acquired for any paper-feeding mechanism, is not void as contrary to public policy on the ground that the contract is not qualified by place or circumstance, where it is limited to the period of the original patent, extends to particular kinds of inventions only, and does not deprive the public of the benefit of inventive genius in any excepting a specified field.

4. A subsequent contract between the same parties, which was executed for the purpose of carrying out the original intention of the parties to the preceding contract, is based on the consideration for the original contract, so that specific performance thereof will not be refused because later developments disclose that one of the parties should have made a better bargain, where there was no fraud and there was sufficient consideration for the original contract but only nominal consideration for the modification.
5. The assignment of all patents existing or in the future issued for inventions relating to paper-feeding devices to be attached to an existing press of specified type, is *held* not to include a paper-feeding mechanism invented and designed as an integral part of a newly invented press of a different type. ESCHWEILER and VINJE, JJ., dissent.
6. Where defendants, in an action for specific performance of a contract to assign patents, counterclaimed asking confirmation of their rights under the patents, but the issues did not present the question of infringement by those patents of patents previously assigned to plaintiff, the court will deny specific performance and not confirm defendants' rights so as to preclude an action for infringement, but will dismiss the counterclaim without prejudice to an action on proper issues to protect defendants' rights.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Modified and affirmed.*

This is a suit brought by the plaintiff, the *Miller Saw-Trimmer Company,* a Pennsylvania corporation, for the specific performance of a contract entered into between its predecessor, Miller Saw-Trimmer Company of Michigan, a Michigan corporation, hereafter referred to as the Michigan Company, and *Edward Cheshire,* one of the defendants, a resident of Wisconsin, by which contract the said *Cheshire* assigned to the Michigan Company certain inventions relating to the feeding and handling of paper, and agreed that he would transfer to the said Michigan Company and its successors and assigns all such further inventions as he might make relating to the feeding or handling of paper during a period of seventeen years following the date of the

contract, as will more fully hereafter appear. The plaintiff claims that the defendant *Cheshire* has perfected certain new inventions which come within the scope of said contract, and that such inventions have been assigned to the other defendants in violation of the contract between the Michigan Company and *Cheshire*.

As a defense it is claimed on behalf of the defendants: *First,* that the contract between the Michigan Company and *Cheshire* is illegal; *second,* that the plaintiff is estopped to claim the benefit of said contract by reason of certain interviews between the plaintiff and *Cheshire* in March, 1917; *third,* that the defendant *Cheshire's* new inventions do not come within the scope of the contract referred to. The defendants counterclaimed, asking to have established and confirmed in them their rights to these new inventions.

The trial court held, *first,* that the contract in suit is a valid and subsisting obligation; *second,* that the defendants' cross-complaint seeking to establish rights in the inventions referred to be dismissed; *third,* that the plaintiff is not estopped to assert its rights under the contract in suit; *fourth,* that the defendant *Cheshire's* patent applications contain inventions in paper feeding and handling which come within the terms of the provisions of the contract in suit; *fifth,* that the facts and circumstances of the case are such as would make a judgment of specific performance inequitable and unconscionable.

This brief statement is made so that the issues litigated may be presented in brief form. In order that the questions raised on this appeal may be fully understood, a more detailed statement of facts is necessary, and in making this we shall simply condense the facts as found by the trial court.

The trial court found the status, residence, and relationship of the parties, and in addition to the facts already stated it appears that the defendant *Simplex Machinery & Tool Company* is a Wisconsin corporation, with its principal

office and place of business at Milwaukee; that the defendant *Milwaukee Automatic Printing Press Company* is a Delaware corporation duly licensed to transact business in the state of Wisconsin, with an office in the city of Milwaukee, where it has an established place of business; that the defendant *Cheshire* was forty-eight years of age in the month of January, 1911; was a skilful mechanic, a competent designer of machinery, and endowed in a high degree with the inventive or creative faculty; that during the year 1908, *Cheshire,* at the suggestion of one of the officers of the *Miller Saw-Trimmer Company* of Wisconsin, undertook the invention and improvement of apparatus for the feeding and handling of paper in connection with printing presses of the flat-platen type, especially the Gordon type of press, and conceived and made certain discoveries and improvements appertaining to such apparatus, which inventions were covered by applications filed in the United States patent office for letters patent; that the said Gordon type of printing press is a hand-fed press, in which the impressions are received by the paper while upon a flat platen, in distinction from a rotary or cylinder press, in which the paper is upon a cylinder or curved surface platen while receiving the impression; that in the operation of the Gordon type of press prior to defendant's invention the paper to be printed was placed on said flat platen by hand and by said platen conveyed to and pressed against the type bed, and then carried away from the type bed by said platen and the printed sheet removed therefrom by hand; that on the 20th day of March, 1909, *Cheshire* and the Wisconsin Company entered into a contract by which *Cheshire* agreed, in consideration of a royalty of $12.50 on each "feeder," and other valuable considerations, to grant to the Wisconsin corporation, its successors and assigns, the sole and exclusive right, authority, and license to make, use, lease, and sell, or otherwise dispose of, within the United States "sheet feeders" made in accordance with the invention described in the application

for letters patent, and all other inventions and improvements relating thereto, or that may be used in connection therewith or for a similar purpose, which had been made or were thereafter made or acquired by said *Cheshire* during the life of the patent; that in the latter part of the year 1909 *Cheshire* was employed by the Wisconsin Company at a salary of $200 a month for the purpose of further developing and perfecting apparatus embodying the inventions described in his application for letters patent, and letters patent issued thereon, the particular description of which is not material here; that after about six months the employment ceased, *Cheshire* not having in the meantime perfected a successfully operative and marketable apparatus for said purpose; that on the 22d day of November, 1910, *Cheshire* entered into a contract with the Michigan Company by which, in consideration of $5,000 paid to him in cash and a promissory note for $1,000 payable in one year with interest, and the payment to him of a royalty of $12.50 for each machine made by the Michigan Company under the contract until the total royalties thus paid should amount to $7,000, sold and transferred to the Michigan Company all right, title, and interest in and to the aforesaid letters patent in the United States and applications for letters patent, and in said contract *Cheshire* further agreed:

"That said assignment shall include all future inventions which may be made or acquired by said *Edward Cheshire* covering the mechanical devices or apparatus designed to be used in the operation of printing presses of the type known as Gordon or platen press and consisting of sheet feeders with its various parts and attachments for feeding said type of printing press, together with any parts or attachments or any and all inventions or improvements relating thereto or that may be used in connection therewith or for a similar purpose."

By said contract *Cheshire* further agreed to re-design the machine which constitutes the subject matter of the patents

and applications for letters patent, which designs were to be completed before January 10, 1911, and to furnish a complete drawing thereof within two weeks from January 10, 1911; and as compensation for services during that period the company was to pay *Cheshire* at the rate of $150 per month. On January 14, 1911, the Michigan Company requested *Cheshire* to sign an amended form of the contract of November 22, 1910, and thereupon and in response to such request *Cheshire* then and there executed a contract dated January 14th, and by said contract of January 14th the November 22d contract was amended as follows:

"The assignor hereby promises and agrees to sell, assign, transfer, and set over unto the assignee the entire right, title, and interest in and to such inventions as relate to the feeding or handling of paper which he may hereafter make or acquire during the term of seventeen (17) years from the date of this instrument, and in and to any applications or letters patent on such inventions and any letters patent that may be granted on such applications, and any re-issues or extensions of the same; and in and to his joint interest in any and all inventions which he may make jointly with another party or parties; and in any applications for letters patent on such joint inventions, and any letters patent which may be granted thereon, or any re-issues or extensions of the same. And he hereby agrees that he will, at the request and charges of the assignee, make application for letters patent for any of such future inventions as he may have or acquire, that the assignee may deem desirable, and that he will execute assignments and do all such other and further acts as are necessary to perfect the title of the assignee therein, and the assignor hereby sells and assigns to the assignee all rights to foreign patents for the inventions transferred, or to be transferred in the future, under this agreement, and agrees to sign, execute, and deliver, upon request, any and all documents deemed necessary by the assignee, its attorneys or agents, to the procurement of such foreign letters patent and for the purpose of completing and perfecting the title of the assignee therein. Provided, however, that the expense of applying for, obtaining, and keeping in force such foreign letters patent shall be borne by the assignee."

It further appears that the only consideration moving to *Cheshire* from the Michigan Company for the execution of the contract of January 14, 1911, was the sum of $10 in cash; that the other considerations to be paid to *Cheshire* by the contract of January 14th were those described in the already existing contract of November 22, 1910; that the Michigan Company paid *Cheshire* the sum of $10; that excepting for the changes of the provisions of the contract of November 22, 1910, relating to the assignment of future inventions, and the payment of the $10, the contracts of November 22, 1910, and January 14, 1911, were substantially alike. *Cheshire* then completed the re-designing of the machine, furnishing the drawings thereof within the time limited by the contract of November 22d. The Michigan Company paid him the agreed compensation. The machine thus re-designed did not prove a commercial success. In the month of May, 1912, the Michigan Company again asked *Cheshire* to re-design and perfect said machine, and agreed to pay *Cheshire* for said services a salary of $250 a month, and to pay rent and the costs of material required in such employment until the 24th day of November, 1913. During his employment *Cheshire* re-designed and perfected the machine, installed machinery for the manufacturing thereof, and the company commenced to manufacture the re-designed machines. The first one was sold in the month of August, 1913. In November, 1913, *Cheshire* quit the employment of the Michigan Company, and has not since that time been in the employment of the Michigan Company or any of its successors.

It further appears that before the 24th day of November, 1913, *Cheshire* had performed all the terms, conditions, and provisions of the contracts of November 22, 1910, and January 14, 1911, and it further appears that the plaintiff and its predecessors in interest paid to said *Edward Cheshire* at various times after said 14th day of January, 1911, royalties on machines sold by them at the rate of $12.50 per machine,

until the full sum of $7,000 was paid, the last payment being made on the 15th day of September, 1916; that the Michigan Company and its successors had fully and faithfully performed said contract. During the employment of *Cheshire* he devised and invented certain improvements in apparatus for feeding and handling paper in connection with the Gordon type of printing press, for which applications for letters patent were filed, a particular description of which is not material here. These inventions and the applications were assigned by *Cheshire* to the plaintiff or its predecessors. It further appeared that the plaintiff is by assignment dated June 11, 1913, the owner of all of the rights of the Michigan Company in and to the inventions and letters patent made by *Cheshire* covered by the contract down to November 24, 1913.

It further appears that the business of the plaintiff is the manufacture and sale of a device known as the Miller saw-trimmer, and since August, 1913, the manufacture and sale of the apparatus embodying the inventions relating to the feeding and handling of paper hereinbefore referred to, such apparatus being ordinarily known as the "Miller platen press feeder"; that such Miller platen press feeder was generally constructed and sold by the plaintiff as a unitary, self-contained attachment for printing presses of the Gordon type; that the plaintiff does not manufacture printing presses, but purchases them and attaches the Miller platen press feeder thereto. The plaintiff has invested a large amount of money in the development and exploitation of the inventions made by *Cheshire,* the amount exceeding $250,000; that up to May 31, 1919, 5,569 of said Miller platen press feeders were sold by plaintiff, at an aggregate sales price of $3,911,450, and that from May 31 to December 1, 1919, 1,906 of said machines were sold, at an aggregate sales price of $1,413,000. All of said press feeders were attached to or sold for attachment to the Gordon type of press, with the exception of four.

After *Cheshire* left the employment of plaintiff and prior to February, 1917, he conceived and invented an automatic cylinder printing press and constructed a small wooden model exemplifying to a limited extent the general design and co-ordination of some of the parts of said press; that in February, 1917, *Cheshire* exhibited said model to one of the plaintiff's officers, and in April, 1917, exhibited the model to its patent attorney and suggested that the plaintiff become interested in the development and exploitation of said cylinder press; that as exhibited said wooden model did not disclose to the plaintiff any new invention relating to the feeding or handling of paper, and that *Cheshire* did not inform the plaintiff that he intended to apply to the said cylinder press any invention made by him relating to the feeding or handling of paper; that none of the new inventions and patentable improvements in paper-feeding and handling devices, as described in the applications for letters patent thereafter filed and in the machines thereafter built in conformity thereto, with the exception of a transfer table, were exemplified by said model when it was exhibited to plaintiff's officers; that until October 7, 1918, plaintiff had no notice or information that *Cheshire* or any of the defendants used or intended to use any device or improvement invented by said *Edward Cheshire* relating to the feeding or handling of paper, on or in connection with said cylinder press; that said plaintiff has never, in any manner, authorized or licensed said *Edward Cheshire,* or any of said defendants, to use any device or improvement invented by the said *Edward Cheshire* relating to the handling or feeding of paper, on or in connection with said cylinder press or otherwise.

The plaintiff advised *Cheshire* in April, 1917, that it did not then desire to become interested in said cylinder press, and advised *Cheshire* that if he should invent or apply to said cylinder press or to any press any new invention in paper-feeding and handling mechanism that such invention

would belong to plaintiff under the terms of the contract of January 14, 1911. In May, 1917, the plaintiff advised *Cheshire* that it could not undertake the manufacture of his new machine, expressed interest in it, and asked him to defer the matter until the next fall; that in May, 1917, *Cheshire* exhibited the model before referred to to Paul D. Durant, and submitted to Durant the communications which had passed between *Cheshire* and the plaintiff during the months of February to May, 1917; that in reliance thereupon *Cheshire* entered into a contract with Durant and his associates by which Durant and his associates were to furnish the funds to construct a cylinder press in accordance with the model. *Cheshire* entered their employ for the purpose of perfecting the invention, at a salary of $250 a month, and was to receive twenty-five per cent. of the capital stock of the corporation to be organized and certain royalties; and in consideration therefor he agreed to convey the invention and letters patent which should be obtained thereon to Durant and his associates and successors. Durant and his associates furnished capital to the amount of $8,000, and subsequently the *Simplex Machinery & Tool Company* was organized with a paid-in capital stock of $25,000.

"That said cylinder press, as finally developed by said defendants, is comprised of a printing bed and an impression cylinder which are relatively movable in opposite directions in vertical planes, a transfer table moving in unison with the cylinder and receiving the sheets of paper, means for automatically feeding said sheets to said transfer table and to said cylinder and registering and gripping them in said cylinder, and also means for delivering said sheets, after the printing operation, to a delivery table and properly stacking them thereon; that the said cylinder press is commercially inoperative and impractical without said feeding, registering, and delivery means, or any of them; that said means, and each of them, were constructed for use as essential parts of the said cylinder press; and that without adaptation and modification, said feeding, registering, and

delivery means are each incapable of practical use on any other type of printing press."

After the development of said invention another corporation, the defendant *Milwaukee Automatic Printing Press Company,* was organized with a capital stock of $250,000 for the purpose of engaging in the general business of manufacturing the cylinder press with the automatic paper-feeding and handling devices embodied therein. Up to the time of the trial said *Milwaukee Automatic Printing Press Company* had expended $25,000 in cash for tools, machinery, patterns, and equipment which are especially adapted to the manufacture of said automatic cylinder press.

In the month of January, 1918, the plaintiff first learned that *Cheshire* was working upon a cylinder press to which paper was automatically fed, but was unable to procure any information as to the details thereof until the 8th day of October, 1918, when a representative of the plaintiff first learned of the construction of said cylinder press and the paper-feeding and handling apparatus connected therewith.

The court found:

"That in said cylinder printing press, as developed and about to be exploited by said *Edward Cheshire,* in co-operation with his codefendants, there are embodied certain new inventions in paper-handling and feeding devices which are the inventions of said *Edward Cheshire;* that said new inventions in paper-handling and feeding devices are of such nature and character that they are within the terms of said contract made on January 14, 1911; that said new inventions are not designed to be used in the operation of said Gordon type of press, and hence are not within the terms of said contract dated November 22, 1910."

That *Cheshire* swore to his inventorship of the paper-feeding and handling devices as embodied in the cylinder press in said applications for letters patent; that the inventions and applications for letters patent had been assigned to the *Milwaukee Automatic Printing Press Company* by the *Simplex Machinery & Tool Company;* and that the *Mil-*

waukee Automatic Printing Press Company took the assignment with full knowledge of the contract of January 14, 1911.

The court further found:

"That of the 124 claims set forth in said application for letters patent designated as Serial No. 224,426, 107 claims, to wit, claims numbered 1 to 100, both inclusive, and claims numbered 118 to 124, both inclusive, relate principally to the feeding or handling of paper; and that twenty-one claims, to wit, claims numbered 34 to 54, both inclusive, of the claims set forth in said application for letters patent designated as Serial No. 329,926, relate principally to the feeding or handling of paper."

It further appears that the plaintiff had not requested *Cheshire* to make an assignment to it of any of the inventions or applications for letters patent embodied in the cylinder press.

For reasons stated in a carefully prepared opinion, the trial court concluded as a matter of law that the plaintiff was not entitled to have the contract of January 14, 1911, specifically performed; that the defendants were entitled to judgment vacating all injunctions *pendente lite* which had been issued, and dismissing the complaint on its merits, with costs; that the plaintiff is entitled to judgment dismissing the counterclaim of the defendants on its merits; and that the defendants are entitled to recover from the plaintiff such damages as they sustained by reason of the injunctions issued *pendente lite*. Judgment was entered accordingly, and from the judgment so entered the plaintiff appeals.

For the appellant there were briefs by *Austin, Fehr, Mueller & Gehrz,* attorneys, and *Melville Church* and *Frank T. Boesel,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Church* and *Mr. Boesel.*

Frank M. Hoyt of Milwaukee, attorney, and *Robert H. Parkinson* of Washington, D. C., and *George L. Wilkinson* of Chicago, of counsel, for the respondents.

The following opinion was filed July 3, 1920:

ROSENBERRY, J. The trial court held, and we think correctly, that no estoppel arose as against the plaintiff by reason of the transactions had between the plaintiff and *Cheshire* at the time *Cheshire* went to Pittsburg to exhibit his new invention to the plaintiff. While it was argued strenuously by the defendants that the plaintiff is estopped, certainly no estoppel arose upon the facts as found by the trial court, and the findings in relation to estoppel are amply sustained by the evidence.

The trial court found that the wooden model exhibited by *Cheshire* to the plaintiff did not disclose any new invention relating to the feeding and handling of paper, and that *Cheshire* did not inform the plaintiff that he intended to apply to the cylinder press any invention made by him relating to the feeding and handling of paper; that none of the essential matters constituting the new inventions and patentable improvements in paper-feeding and handling devices were exemplified by the model exhibited to the plaintiff. Upon these facts it requires no discussion to show that no estoppel arose as against the plaintiff. *Cheshire* and the other defendants knew that if *Cheshire's* new invention was one relating to paper-feeding and handling devices it would be claimed by the plaintiff under its contract; and in proceeding to develop *Cheshire's* new invention the defendants proceeded at their peril so far as the rights of the plaintiff were concerned. *Littlefield v. Perry,* 21 Wall. (88 U. S.) 205; *Printing & Numerical R. Co. v. Sampson,* 44 L. J. Ch. 705; *Aspinwall M. Co. v. Gill,* 32 Fed. 697; *Consolidated R. E. L. & E. Co. v. U. S. L. & H. Co.* 77 N. J. Eq. 285, 78 Atl. 684.

The defendants attack the contract as amended on the ground that it is void as against public policy, mainly upon the ground that it was not qualified by place or circumstance, and extending as it does by its terms until *Cheshire*

shall reach the age of sixty-five years, it will operate to deprive the public of the benefit of the exercise of his inventive genius in this field. We shall not discuss this question in detail. By its terms the contract is limited to that period during which the assigned patent would extend, and by its terms the contract is limited as to particular kinds of inventions and does not deprive the public of the benefit of *Cheshire's* inventive genius in any excepting the specified field. We see nothing in the contract which in any way contravenes public policy. *Aspinwall M. Co. v. Gill,* 32 Fed. 697; *Westinghouse A. B. Co. v. Chicago B. & M. Co.* 85 Fed. 786; *Littlefield v. Perry,* 21 Wall. (88 U. S.) 205; *Atlas P. Co. v. Eames* (Mich.) 173 N. W. 344.

The trial court was of the opinion that, although the contract was valid and the plaintiff was not estopped, the plaintiff was nevertheless not entitled to have the contract specifically enforced, because under the facts and circumstances it would be unconscionable and inequitable to decree specific performance of the contract dated January 14, 1911. We cannot state more briefly than in the language of the trial court the facts upon which this conclusion was based:

"1st. In the first place, the plaintiff necessarily relies upon the enlargement, by the contract of January 14, 1911, of *Cheshire's* obligation to assign future inventions, as basis for its claim that it is entitled to an assignment of the new inventions, asserted by *Cheshire* in claims No. 1 to 100 and No. 118 to 124, in application No. 224,426, and in claims numbered 34 to 54, in application No. 329,976.

"As consideration for that enlargement of *Cheshire's* obligation, only $10 were paid to him. No other consideration was paid or promised him, and no additional obligation, forbearance, or detriment was incurred by the *Miller Saw-Trimmer Company* as consideration for that enlargement of *Cheshire's* obligation. Hence, at the outset the court is confronted with the fact that the enlarged rights which plaintiff now seeks to have specifically enforced in equity are founded upon a new consideration of only $10.

"2d. Next, it is important to note that neither under the contract of January 14, 1911, nor under the contract of November 22, 1910, was *Cheshire* entitled to continue in the employment of the plaintiff, or its predecessors in interest, for any definite period of time. Since November 24, 1913, he has not been in the employment of the plaintiff, or its predecessor, and has not received anything from the plaintiff, or its predecessor, excepting the balance of the sum of $7,000 which was payable as royalties on account of the patents originally assigned by him, and which was completely paid by September 15, 1916.

"3d. On the other hand, the new inventions, the ownership of which is now in dispute, were neither conceived nor developed until after *Cheshire* had ceased to be in the employment of the plaintiff and its predecessors in interest, and to receive any compensation whatsoever from those sources.

"4th. Neither the plaintiff, nor its predecessors in interest, ever promised to compensate *Cheshire* for any new invention which he might make after the termination of his employment by them.

"5th. Likewise, the contract fails to reserve to *Cheshire* any interest in the future inventions by way of ownership by him of an undivided interest therein, or of future compensation to him, as royalties or annuities, during the use of such inventions by the plaintiff, or of ownership, or the privilege of acquisition, by him, of stock in a corporation which was to own, or enjoy the fruits of, such future inventions.

"6th. *Cheshire's* inventions after November 24, 1913, relate primarily to the printing means of his new cylinder press. The invention of the new paper-feeding and handling devices was but incidental to his invention of those printing means. Those paper-feeding and handling devices were necessary to render the press automatic and commercially operative. They are inapplicable for practical use on any other type of press without modification and special adaptation. And the plaintiff does not claim to be entitled to such of the new inventions as relate solely to the printing and not to the feeding and handling of paper.

"7th. Those new inventions are not necessary for the completion into a practically operative machine, of the paper-feeding and handling devices manufactured by the plaintiff for use on the Gordon press.

"8th. Further, *Cheshire* first offered the plaintiff a reasonable opportunity to acquire an interest in the new inventions relating to the press itself, and only sought to interest his present codefendants after the plaintiff failed to accept that offer. Since then, *Cheshire* and his codefendants, in good faith, have undertaken and proceeded with the development and perfection of that press, including the paper-feeding and handling devices which were necessary for automatic operation, and for those purposes they expended about $33,000 up to the time of the commencement of this action."

In our judgment the trial court was in error in holding that the contract of January 14, 1911, was a separate and distinct contract and that the sole consideration therefor was the $10 as stated in the contract itself. We are of the opinion that the contract of January 14, 1911, must be considered in connection with the contract of November 22, 1910. It is apparent from the face of the contracts that the agreement of January 14, 1911, was executed for the purpose of carrying out and expressing the original intention of the parties at the time the November contract was entered into. *Reece F. M. Co. v. Fenwick,* 140 Fed. 287; *Mississippi G. Co. v. Franzen,* 143 Fed. 501. So construed the consideration is not inadequate, and if *Cheshire's* new invention is within the terms of the contract there is nothing inequitable or unconscionable in compelling him to carry out his agreement. Where, as here, an inventor enters into a contract to assign and convey future inventions upon an adequate consideration, there being no fraud, duress, or overreaching by the opposite party, both parties having entered into the contract in good faith and for their mutual benefit, the mere fact that subsequent developments show that the inventor should have made a better bargain for himself, or that the profits of the business have been exceptionally and unexpectedly large, does not affect the situation of the parties. The validity of the contract and the right of the parties to its enforcement is to be considered as of the date of the contract. Neither *Cheshire* nor the plaintiff's predecessors in title were in any way certain that *Cheshire's*

invention would ever prove commercially successful. If, therefore, *Cheshire's* new invention was within the contract of November 22, 1910, as amended by the memorandum of January 14, 1911, the plaintiff was entitled to have its contract specifically performed. This brings us to the consideration of the question, Is *Cheshire's* new invention within the terms of the contract as amended?

The language is:

"The assignor hereby promises and agrees to sell, assign, transfer, and set over to the assignee the entire right, title, and interest in and to such inventions as relate to the feeding or handling of paper which he may hereafter make or acquire during the term of seventeen (17) years from the date of this instrument," etc.

It is difficult to put upon paper an adequate description of *Cheshire's* new invention. *Cheshire's* original invention constituted what would ordinarily be known and described as an attachment to an already existing press. It could be put upon a hand-fed press, swung away from it so that the press might be fed by hand, and would facilitate making the press ready for a job. We take from the brief of counsel a detailed description of this machine, which with the accompanying photographs (Exhibits 19 and 20) will make *Cheshire's* first invention understandable:

"The plaintiff's machine will readily be understood from the . . . photographs, Exhibits 19 and 20, of which Exhibit 19 shows the machine ready to print, and Exhibit 20 shows it with a section of the feeding and handling mechanism swung away from the press portion to facilitate making the press ready for a job, or to permit hand feeding. The press portion of the machine consists of a rocking type-supporting member 'A,' called the bed. It is pivoted at 'B,' so as to swing on a long radius. The paper-supporting member 'C,' taking the form of a flat platen, rocks also, the bed and the platen rocking towards each other (coming into close contact under pressure) to perform the printing operation, and subsequently rocking away from each other so that the sheets may be fed to, and taken away from, the

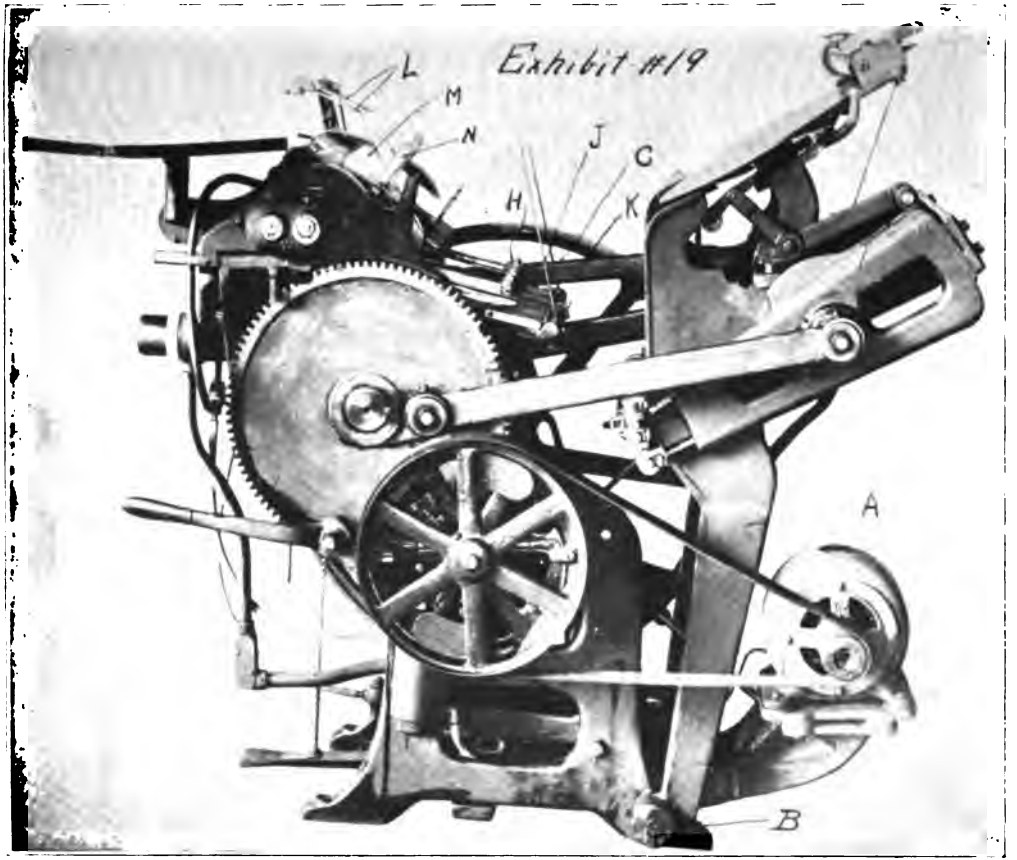
Exhibit #19
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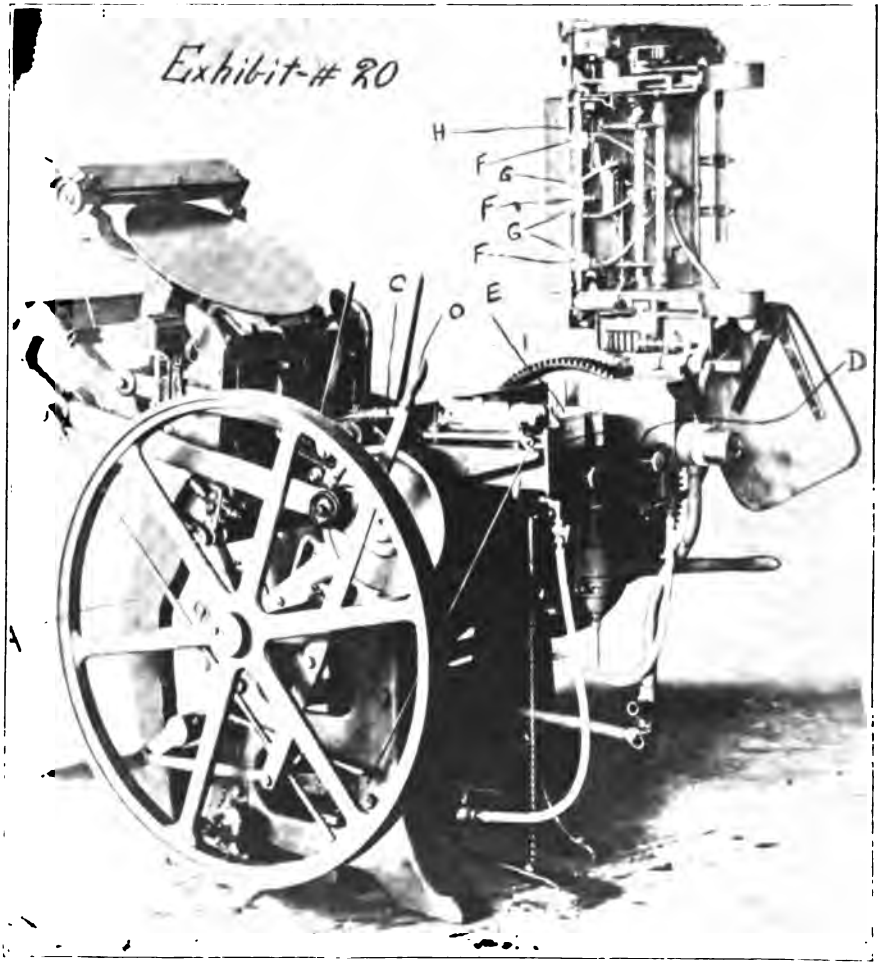
Exhibit-# 20
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platen. When the platen rocks away from the bed to receive a sheet, it comes to a nearly horizontal position of rest, to give time for a sheet to be placed upon it. This much of the machine, is, as stated above, purchased from the Chandler & Price Company, and suitably modified for the reception of the paper-feeding and handling mechanism now to be described.

"The paper-feeding and handling mechanism includes a stock table, 'D,' upon which the pile, 'E,' of sheets is placed, a large number of sheets being placed, in one stack, on this table ready for feeding. Above the stock table, 'D,' is a sheet-separating element, which includes a number of pneumatic suction feet, 'F,' having holes in their lower sides to which suction is applied to cause a sheet of paper to attach itself thereto. With the stack of sheets on the table, the suction feet, 'F,' usually three in number, descend upon the pile and engage the top of the first sheet near its front edge, suction being applied to the feet at that time. The application of the suction to the feet causes the top sheet of the pile to attach itself thereto, whereupon the suction feet rise a short distance, carrying with them the top sheet attached. In this way the top sheet is individually released, by the sheet-separating element, from the balance of the pile, raised a short distance, and held in a position ready to be carried forward to the platen, 'C.'

"An intermediate element carries the separated sheet forward to the platen. This intermediate element includes a cross-bar, 'H,' carrying mechanically actuated feed grippers, 'G,' which come towards the sheet in its separated and suspended condition, grasp the sheet, and thereafter move out over the platen, 'C,' sliding out in a plane parallel with the latter. There is a stop or abutment, 'K,' on the platen, in the path of the advancing sheet, against which the edge of the sheet strikes. When these feed grippers, 'G,' originally seize the sheet, they hold it firmly. After they have advanced part of the way across the platen, however, their grip on the sheet relaxes; and afterwards they only hold the sheet impositively, or loosely, so that when the sheet strikes the abutment, 'K,' it is enabled to be pushed out from the grippers, the grippers thereafter moving on their way, leaving the sheet engaged with the abutment, 'K,' on the platen, 'C.' In the position of the parts shown in Exhibit 19 the

grippers have received the sheet from the separating position and have brought it part way out onto the platen. They have loosened their grip on the sheet and are just about to cause the sheet to strike the abutment, 'K' (a registering fork), and thereby be removed from the grippers and left on the platen. After this has been accomplished, the feed grippers retire out of the way and the platen moves forward to its printing position.

"After the sheet has thus been deposited on the platen and the grippers have moved back out of the way, the platen, 'C,' rocks forward to meet the advancing bed, 'A,' and the printing operation is performed. After the printing operation (as the platen begins to rock backward to receive another sheet), delivery grippers, 'L,' engage the face of the platen, entering between it and the rear edge of the sheet, and seize the sheet by this rear edge. After thus seizing the sheet they swing back over a delivery table. When they arrive over the delivery table, the delivery grippers, 'L,' open and the sheet falls onto the delivery table, the printed sheets thus being stacked, in a pile, 'M,' on the delivery table. Automatically actuated joggers, 'N,' are provided on the delivery table, which joggers intermittently strike the sides of the stack of printed sheets, bringing it into a neat and orderly pile ready for shipment.

"It will be understood that as the sheets are withdrawn one by one, in feeding, from the top of the pile 'E,' the height of the pile diminishes. With this separating device, it is a requisite that the top of the pile shall remain at a substantially constant level. To provide for this, the stock table, 'D,' is equipped with an automatic mechanism which raises it intermittently on each cycle of the press; that is, the table rises a given increment on each operation of the press to compensate for the diminished height of the pile due to the previous sheet being taken away.

"It has been stated that the sheet, upon being fed forward by the feed grippers, 'G,' strikes an abutment, 'K,' on the platen, 'C.' This abutment takes the form of a spring fork, into the jaws of which the sheet is placed by the grippers; so that when the platen, 'C,' begins to move towards the bed for printing, the sheet is lying on the platen engaged in the jaws of this fork, 'K.' As the platen rocks forward to the printing position, the fork, 'K,' is given a movement

in the arc of a circle in the same plane as the surface of the platen, causing the sheet to be brought downwardly and sidewise. The downward movement brings the sheet against two stops, or end register pins, 'J,' on the platen, and the sidewise movement brings it against a side-stop or side-register pin on the platen (not seen in the photographs). The sheet is thus left in engagement with these two sets of stops, the end stops and the side stop, and is thus accurately placed on the platen so that the printing will be correctly placed on the paper. In other words, an accurate register is obtained in this way.

"In case a sheet should not be fed to the platen, were no mechanism provided to prevent it, the type on the bed would make an impression upon the surface of the platen, and the ink thus placed on the platen would be printed on the back of the succeeding sheets when they were fed again. To prevent this, a device is provided for causing the bed movement to be modified whenever a sheet is not fed, the modification of the bed movement having the result that the bed does not quite reach the platen, instead of pressing against it, as it does in the ordinary printing operation. The press portion is provided with a hand lever, 'O,' by which this device may be manually actuated. The paper-feeding and handling mechanism includes automatic means for operating this 'throw-out device,' as it is usually termed. The automatic mechanism is governed by the presence or absence of vacuum in the suction feet, 'F.' In other words, when a sheet is raised by the suction feet, 'F,' this sheet seals the air openings in the bottom of the feet; consequently there is a vacuum in the suction feet. When no sheet is lifted by the suction feet, air can be drawn in through the holes in the bottom; consequently there is no vacuum in the suction feet. The automatic mechanism for actuating the throw-out device is so arranged that when there is a vacuum at the feet, 'F,' the throw-out device will not be actuated; but when there is not a vacuum in the feet, the throw-out mechanism will be actuated. When, therefore, the machine misses feeding a sheet, the throw-out mechanism will automatically operate and prevent damage from resulting.

"A section of the paper-feeding and handling mechanism is made to swing vertically about a pivot, as seen in Exhibit 20; so that it may be easily put out of the way to permit an

operator to feed the press by hand if desired, and to permit of the platen being easily made ready for printing a job. By 'made ready' is meant the usual operations which must be performed on the platen preparatory to printing a job.

"The suction feet, 'F,' are of a very especial construction, at their bottom faces, to insure the lifting of one sheet and prevent the lifting of more than one sheet. To further facilitate proper separation, the feeder mechanism is provided with a blower which blows air between the sheets while they are still piled at 'E,' from the front edges. The effect of the blowing in of air is to cause the top sheets to be afloat with a volume of air between them so that they are more easily separated."

Cheshire's new invention is described as follows:

"The defendant's most recent construction of machine . . . . will be understood from the photographs, Exhibits 21, 22, and 23. Exhibit 21 shows the machine in the position in which the platen is about to make its upward movement for printing a sheet, and then a sheet is there just about to be, or just has been, grasped by the grippers on the platen. Exhibit 22 shows the platen when it has completed the printing of a sheet, and has arrived at its topmost position, the printed sheet being about to be taken from it by the delivery grippers. Exhibit 23 shows chiefly the feeding and handling mechanism, and displays the grippers of the platen and the top face of the transfer board, with the platen part way between its upper and lower position.

"The defendant's machine includes a press portion and a paper-feeding and handling mechanism. The press portion comprises a vertically moving type supporting member, or bed, 'A,' and a vertically moving rolling impression member, or cylindrical platen, 'B,' which latter is pressed against the bed during the movements of the two parts. The movement of the platen, 'B,' is in the opposite direction to the movement of the bed, 'A,' that is, as the bed, 'A,' moves downward, the platen, 'B,' moves upward, and, rolling over the type, effects the printing impression. The cylindrical platen, 'B,' is provided with a number of grippers, 'J' (Exhibit 23), for seizing the sheet to be printed and retaining it on the impression member during the printing operation.

"The paper-feeding and handling mechanism includes a

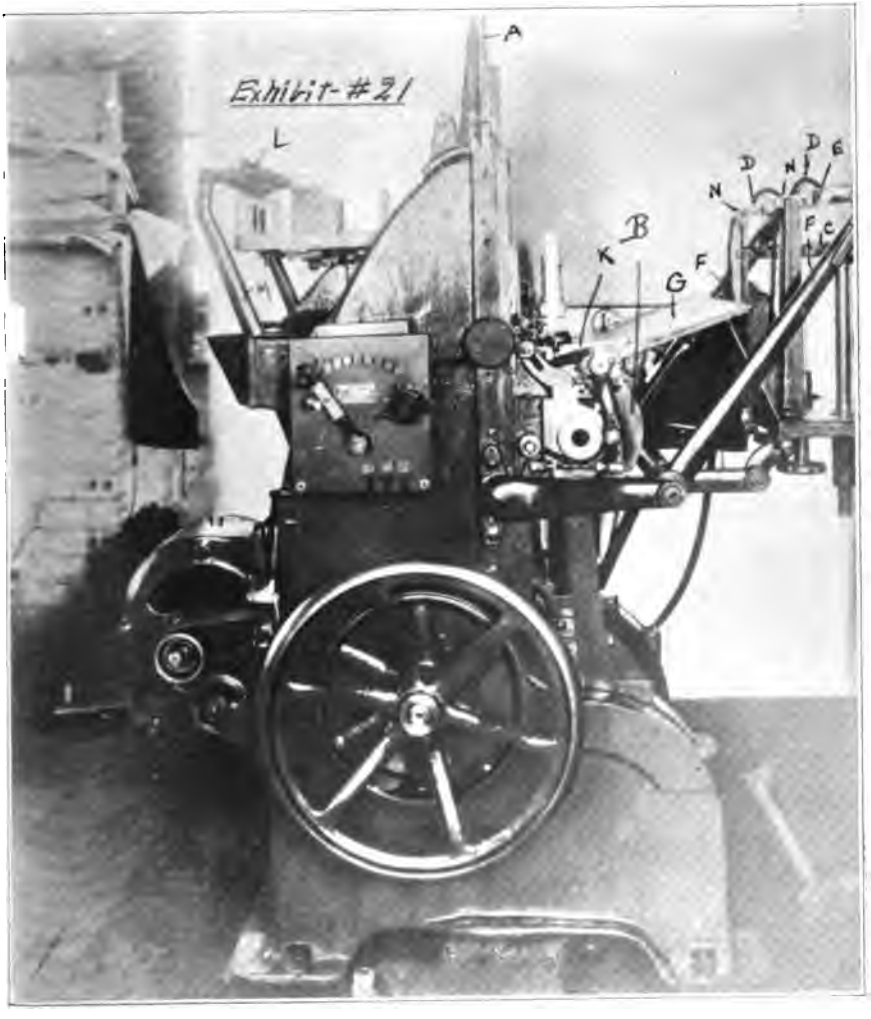
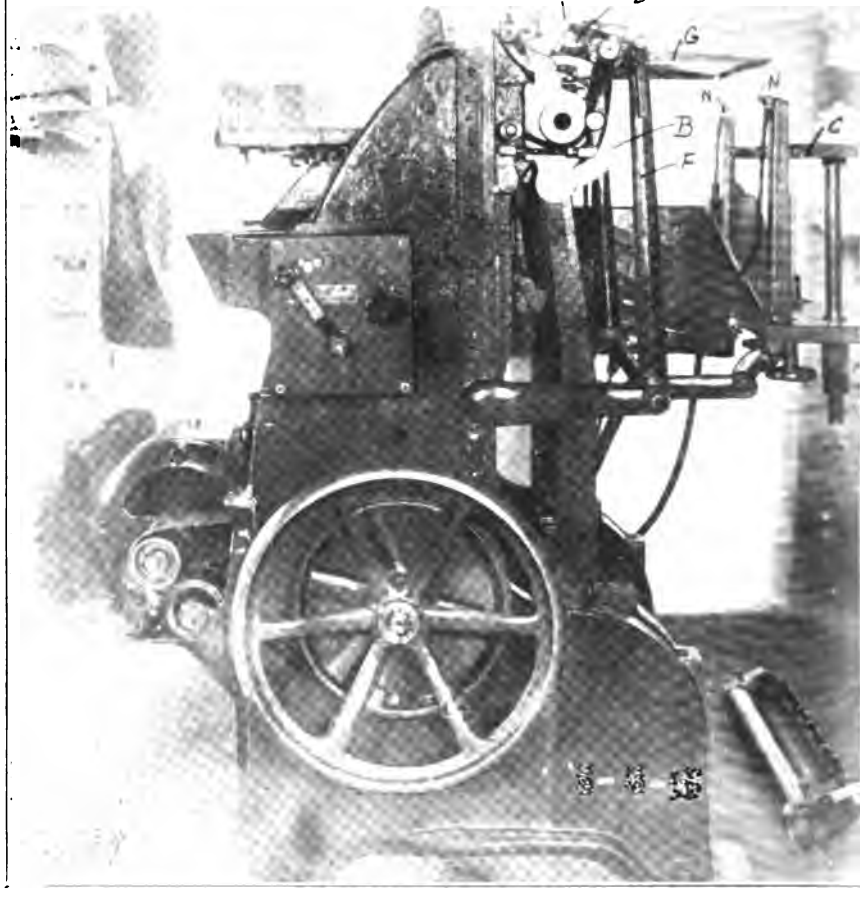


Exhibit-#21
A
L
B
K
G
F
N
D
N
D
E
F
C

Exhibit #22



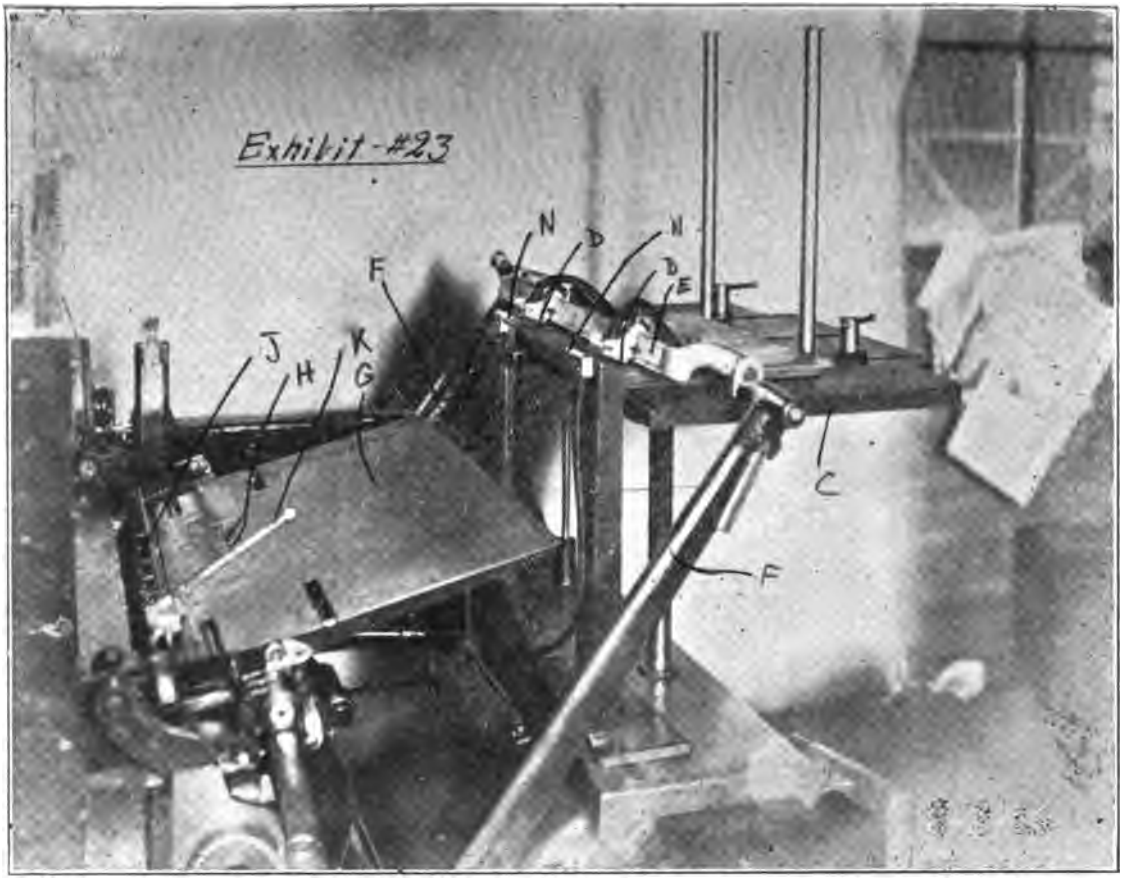


Exhibit-#23
N
D
N
D
E
F
J
H
K
G
C
F

stock table, 'C,' upon which the paper to be printed is piled in the form of a stack, from which the sheets are separated and removed one by one by a sheet-separating element. The sheet-separating element includes a pair of pneumatic suction feet, 'D,' which are caused to periodically descend upon the top sheet of the pile, and, having suction applied to them, cause the top sheet to adhere to their faces. When the suction feet, 'D,' subsequently rise, they carry with them the top sheet of the pile, thereby separating it from the balance of the paper. The suction feet, 'D,' are carried upon a cross-bar, 'E,' which connects the top of a pair of long pivoted arms, 'F,' so that upon these arms, 'F,' being swung about their pivots, the suction feet are brought forward towards the press portion, into the position shown in Exhibit 22. The suction feet, 'D,' move from the position shown in Exhibit 23 (where they are just about to have suction applied to them) down onto the top sheet of the pile of paper. By reason of the suction the top sheet attaches itself to the feet, and, when the feet rise again back into the position shown in Exhibit 23, the top sheet is attached to them and thereby separated from the balance of the pile and raised therefrom. After this has taken place, the arms, 'F,' swing forward, carrying the suction feet over to an intermediate element for transferring it to the platen, 'B.'

"The intermediate element for transferring the sheet from the sheet-separating element to the cylindrical platen, 'B,' takes the form of a 'transfer board,' 'G,' which is carried by the frame of the platen, 'B,' so as to move vertically therewith. The transfer board, 'G,' has a vacuum chamber beneath it and has suction holes, 'H,' in its upper face. When the suction feet, swinging forward from the pile, bring the sheet over the transfer board, 'G,' the suction is cut off from the feet, thereby enabling the sheet to drop onto the support, and suction is simultaneously applied through the holes, 'H,' thus causing the sheet immediately to adhere to the transfer board, 'G.' In other words, the suction feet, 'D,' swing forward over the intermediate element, or transfer board, 'G,' and drop the sheet, owing to the suction being released; and the sheet is then immediately seized by the transfer board, by reason of vacuum applied through the holes, 'H,' in the face of the latter. When the sheet is thus seized by the intermediate member or transfer board, 'G,'

the platen, 'B,' is in its uppermost position and the sheet is close to the platen grippers, 'J.' As the platen, 'B,' descends, the transfer board, 'G,' descends with it, the sheet being held in place, during the first part of the descent, by the vacuum at the holes, 'H.' As the transfer board moves downward, and after it has moved part of the way, suction is cut off from the holes, 'H,' so that the sheet is then only held by its weight upon the support. By this time the platen grippers, 'J,' have opened ready to have the sheet fed against them. During the latter part of its downward movement the transfer board is given a forward movement relatively to the platen. This forward movement has the effect of pushing the front edge of the sheet against the stems of the platen grippers, 'J,' by which grippers the sheet is then seized. These operations have occurred by the time the platen, 'B,' has reached its lowermost position and is just ready to rise for the printing operation. As the platen, 'B,' rises (the bed, 'A,' at the same time descending), it rolls upon the type of the bed, and, in rolling, draws the sheet off from the transfer board, 'G,' and wraps it upon itself. The sheet is thus rolled against the type by the impression member, and the printing impression is made.

"When the platen, 'B,' reaches its uppermost position and the printing impression has been completed, delivery grippers, 'L,' swing forward and engage the edge of the sheet, between the platen grippers, 'J,' and grasp the sheet, removing it from the platen grippers, which latter are opened just at this time. The delivery grippers, 'L,' then swing back to a position over the delivery table, where they drop the sheet upon the printed sheets previously delivered. Jogging devices are provided for stacking the sheets into a neat pile.

"With the defendant's separating device, it is a requisite that the top of the pile of sheets to be fed shall be maintained at a substantially constant level. To this end, the stock table, 'C,' is provided with automatic mechanisms and devices for raising it intermittently, as the paper is removed.

"It has been stated that the transfer board, 'G,' has a forward movement, relative to the platen, to move the sheet into the platen grippers, 'J.' It also has a sidewise movement (the two blending as one diagonal movement), to effect a side register. The forward movement pushes the

sheet against the stems of the platen grippers, 'J,' thus putting it into accurately correct position endwise. The sidewise movement pushes the sheet against a side-register stop, 'K' (Exhibits 21, 22), thus putting it into accurately correct position sidewise. The sheet is thus accurately registered, whereafter the platen grippers, 'J,' close on it.

"The press portion is provided with a throw-out device, by means of which the cylindrical platen, 'B,' is prevented from rotating, during the printing portion of the cycle, when it is desired to prevent a printing impression being effected between the type and the platen impression surface. The paper-feeding and handling mechanism provides automatic means for operating this throw-out device, so as to actuate it whenever a sheet is not properly fed. This automatic means is controlled by the presence or absence of vacuum at the holes, 'H,' of the transfer table, 'G.' In other words, when a sheet is on the transfer table, this sheet seals the holes, 'H,' and a vacuum is consequently maintained. When no sheet is present on the transfer table, the holes, 'H,' are free, and there is no vacuum thereat. In the latter case, the automatic mechanism will actuate the throw-out device. When, therefore, the machine does not feed a sheet, the throw-out mechanism will automatically operate and prevent damage from resulting.

"The stock table and its associated parts are made to swing away from the press portion to permit access to the press portion for make-ready or hand feeding. To the same end, the transfer table, 'G,' is made readily removable from the platen frame, and the cross-bar, 'E,' carrying the suction feet, is made readily removable from the arms, 'F.'

"The suction feet, 'D,' are of a complex construction, at their bottom faces, to insure the lifting of one sheet and prevent the lifting of more than one sheet. To further facilitate separation, blowers are provided for blowing air between the top sheets of the pile at their front edges."

In addition to the evidence, exhibits, and model, and briefs and arguments of counsel, the court has had the benefit of a view of the plaintiff's machine as well as of the defendant's machine in operation. Is *Cheshire's* new invention (defendant's machine) an invention which relates to

the feeding or handling of paper, or is it an automatic cylinder printing press? It cannot be denied that indispensable parts of *Cheshire's* printing press are mechanisms for feeding sheets of paper from piles of stock and delivering the printed sheets from the cylinder to a receiving pile. It is undisputed that those parts of the *Cheshire* press which relate to the feeding and handling of paper are incapable of practical use in connection with any other form of printing press or upon any other machine. We, however, do not regard this as controlling, but it is a fact entitled to weight in arriving at a determination as to the nature and character of the invention. The *Cheshire* press, while it embodies features found in other cylinder presses, contains, as the description shows, many modifications and inventions, and it is admitted that these modifications and inventions are indispensably necessary to its operation. Those parts of the invention which have to do with the feeding and handling of paper are not operative for any purpose unless used in the machine of which they are a constituent part. Cylinder presses automatically fed were well known to the art long before *Cheshire* brought out his invention. If *Cheshire's* new invention be taken apart and each operation therein be considered by itself, it might well be said that some of the mechanism relates to the feeding and handling of paper, but in determining whether or not the invention as a whole relates to the feeding and handling of paper, as that term was used in the contract, or whether it is an automatically fed cylinder printing press, the invention must be considered as a unit. It cannot be considered as a series of correlated inventions some of which relate to one thing and some to another. *Cheshire* invented a cylinder printing press, automatically fed. The completed operation of the machine is properly described as printing. No unit of the machine feeds or handles paper. In the complete operation of the invention a sheet of paper is taken from one table, passed into the machine and printed, and then deposited upon an-

other table. It does by itself what a hand-fed press does when operated by a pressman; that is, it performs the work of printing. The machine, therefore, is not one for feeding and handling paper, but for printing. Not being an invention for the feeding and handling of paper it is not covered by the amended contract. We are governed in arriving at this determination not by the language used by *Cheshire* in his application for letters patent, or any other collateral fact or circumstance, but base our conclusion upon the fact that the invention as a whole relates not to the feeding and handling of paper, but to printing.

We are not here concerned with the question of whether or not the use of some of the elements of this machine constitutes an infringement upon the plaintiff's rights under the letters patent assigned to its predecessors by *Cheshire*. That is a question that is not within the issues made by the pleadings, and is an entirely different question. The terms of the contract do not embrace a printing machine merely because as a component part of it there are devices within it which, when operating with the machine as a whole, feed and handle paper.

Plaintiff's cause of action rests upon the amended contract. Its right to the relief sought depends upon whether *Cheshire's* new invention is covered by the terms of that contract. Not being within its terms, the plaintiff is not entitled to the relief prayed for in its complaint. The judgment of the trial court as to the issues raised by the complaint should therefore be affirmed. Logically it would seem to follow that the defendant is entitled to have its rights to *Cheshire's* new invention confirmed in it pursuant to the prayer of its counterclaim. This would be true if all of plaintiff's rights were embraced in the terms of the amended contract; but it is the assignee of several letters patent assigned to it and its predecessors by *Cheshire*. To award defendants judgment as prayed for in the counterclaim would amount to an adjudication that *Cheshire's* new invention

was not an infringement upon any of the patents now owned by the plaintiff. This question was not litigated. We feel that the record does not disclose facts justifying an adjudication upon that question. The denial of relief to the plaintiff is in effect a judicial confirmation to the defendants of its rights in *Cheshire's* new invention, so far as the issues litigated are concerned. While the defendant is not entitled to judgment as prayed for in its counterclaim, it should not be foreclosed by judgment of dismissal upon the merits. Full justice will be done if the counterclaim be dismissed without prejudice. The judgment must therefore be modified so that the defendants' counterclaim shall be dismissed without prejudice.

By the Court.—The judgment appealed from is affirmed as to the issues raised by the plaintiff's complaint. As to the defendants' counterclaim, the judgment of dismissal is modified as indicated in the opinion, and as so modified is affirmed.

The following opinion was filed July 12, 1920:

ESCHWEILER, J. (*dissenting*). I am in accord with so much of the majority opinion as upholds the trial court in its conclusion that the plaintiff is not estopped to assert such rights as plaintiff might have acquired under its contract of January, 1911. I am also in accord with so much as holds that such contract of January, 1911, was a valid and subsisting one and that the obligations of *Cheshire* were not put at an end by the termination of his employment with the plaintiff.

The contract of January, 1911, being but a modification of the preceding contract, needed no new and additional or other consideration than that which supported the original. *Foley v. Marsch,* 162 Wis. 25, 30, 154 N. W. 982; *Schoblasky v. Raywoth,* 139 Wis. 115, 117, 120 N. W. 822; *Montgomery v. American C. Ins. Co.* 108 Wis. 146, 159, 84

N. W. 175; *Brown v. Everhard,* 52 Wis. 205, 207, 8 N. W. 725.

I am in further accord with the holding that there would be nothing inequitable, unconscionable, or contrary to public policy in the enforcement of plaintiff's contract as against the defendants if it can properly be held to cover and include what is claimed by plaintiff.

I do, however, dissent from the conclusion arrived at by the majority in this case that the paper-handling and feeding device as proposed to be used by defendants in connection with the new form of cylinder press is not within plaintiff's contract.

The paper-handling and feeding device upon which the letters patent were first issued and duly assigned to plaintiff was for a novel idea, not for the mere embodiment thereof in the particular device which plaintiff attached to the platen press. This idea, the product of *Cheshire's* inventive genius, became secured to the plaintiff by what all the members of this court hold was a lawful, valid, and binding contract and one that upon the grounds of public policy could not be denied enforcement. This invention became of commercial and substantial value by the speculative expenditure of large sums of plaintiff's money. The patent obtained from the government and assigned to plaintiff did give the plaintiff that which is recognized as a legal and defensible monopoly in the same during the life of the patent. *U. S. v. U. S. M. Co.* 247 U. S. 32, 57, 38 Sup. Ct. 581. By the combination of a "paper-handling and feeding mechanism," so described by *Cheshire* himself in his new applications, with the so-called new form of cylinder press, the defendants are now being permitted, so far as a judgment of a state court can go as to such subject matter, to proceed with what will evidently be a serious and substantial impairment in the commercial value of that which was originally obtained by plaintiff.

That plaintiff may have no desire to use or be unable to use the precise form in which this "paper-handling and

feeding" mechanism idea is found in the physical embodiment thereof as proposed for the new form of cylinder press, is entirely immaterial. Having secured a right to this as an invention and patent, plaintiff has the right, even though not using it, to exclude competitors from using it. *Henry v. A. B. Dick Co.* 224 U. S. 1, 29, 32 Sup. Ct. 364; *U. S. v. Winslow,* 227 U. S. 202, 217, 33 Sup. Ct. 253.

The original device for which plaintiff paid *Cheshire* a substantial sum was of no commercial value then to plaintiff except as it might be used in connection with the Gordon or platen press. The latter plaintiff must secure upon such terms as it could from some third person manufacturing or controlling the manufacture of the same. The idea embodied in the original paper-handling and feeding device was necessarily considered as a unit of itself, and for the purposes of letters patent it must necessarily be so; for patents are granted for ideas as units, not as fractions, nor for mere combinations of separate patented or patentable units. As such original unit it acquired commercial value from being attached to the platen press. There was no new unit created by the application of this paper-handling and feeding device to the platen press so as to make such a new idea or combination so that as such it became the subject of letters patent. It was the same unit before being attached to the platen press that it was after being so attached, and *vice versa.*

In what defendants now propose to use, the individuality of the idea of a paper-handling and feeding device is as clear and distinct in the specifications prepared by *Cheshire* himself and in the application of the idea to the new form of cylinder press as it is under the original applications and subsequent use. The details of the form of its becoming embodied in a device are different, but the idea, the subject of invention and of letters patent, is as much present in the one as in the other, and can be seen with as little difficulty in the latter device as in the former.

If some person other than *Cheshire* had originated the idea embodied in the change of position of the cylinder in the so-called *Cheshire* cylinder press to which defendants assert rights and then *Cheshire* had been induced to apply to such new idea of a press the paper-handling and feeding mechanism as embodied in his subsequent applications here involved, it would seem plain that his so applying such a "paper-handling and feeding mechanism" to such third person's new idea of cylinder press would be a violation of the spirit and the letter of plaintiff's contract. That *Cheshire's* inventive genius was broad enough to cover the two fields—the new form of cylinder printing press as well as that of a paper-handling and feeding device—in no manner destroys the rights acquired by plaintiff as to the one field of that inventive genius that was originally developed by *Cheshire* at plaintiff's suggestion and on its money.

The idea of a paper-handling and feeding device as a unit was not swallowed up by its application to the platen press so as to lose its identity. I fail to see by what alchemy it can be held to have mysteriously disappeared, become absorbed, and swallowed up by its mere application to another form of press which accidentally happened to be also the result of *Cheshire's* inventive genius.

The Gordon press with the original paper-handling and feeding mechanism attached thereto becomes of more commercial value than the Gordon press as a hand feeder. It is quite possible that the new form of cylinder press now suggested by *Cheshire* will be of no substantial value except and unless a "paper-handling and feeding device" can be attached thereto. This demonstrates nothing more than the substantial value and worth of that which plaintiff purchased from *Cheshire* in the original instance. It no more makes the combination of such device with the new cylinder press a separate and distinct unit than did the added value to its combination with the Gordon press make that combination something more and independent.

To my mind the situation demonstrates that the parties intended by the contract of January, 1911, that *Cheshire's* inventive genius, so far as it related to a "paper-handling and feeding device," was to be at plaintiff's service for the term of seventeen years, and it paid substantial and valuable consideration for such an agreement. The defendants are now permitted to take advantage of the identical thing so pledged in good faith to plaintiff. I think, therefore, the plaintiff was entitled to the relief for which it prayed.

VINJE, J. I concur in the foregoing dissenting opinion of Mr. Justice ESCHWEILER.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

SMITH, Respondent, vs. CRUCIBLE STEEL CASTING COMPANY, Appellant.

May 10—September 25, 1920.

Principal and agent: Commissions received from others: Disclosure of facts to principal: Validity of commission contract: Cancellation of contract: Evidence: Action for accounting: Recovery of damages to time of trial.

1. It was proper for an employee of an automobile company to accept commissions from a steel company for placing orders from his employer with the steel company, if the employer knew the employee was receiving such commissions; and where the conduct of the employer indicated that it did not require to be informed as to the amount, the employee was not bound to disclose the terms of his commission contract.
2. The evidence is *held* to sustain the court's conclusion that there was no cancellation of the written contract for plaintiff to procure business on commission from the automobile company, and that the delivery of the commission contract to defendant's president was not a surrender of the contract but was upon the promise and condition that it would remain in

force and cover all future orders from the automobile company.

3. It was improper to limit the accounting sought to recovery of commissions due prior to the commencement of the action, and it should extend to commissions up to the date of trial.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This action was brought by the plaintiff for an accounting and to recover commissions claimed to be due him upon contract.

The complaint alleges, in substance, that defendant was a corporation engaged in manufacturing steel castings, and that the Four Wheel Drive Auto Company, hereinafter called the Auto Company, was a corporation engaged in the manufacture of auto trucks and was using and likely to use in the future a large amount of steel castings; that about June 8, 1915, defendant agreed with plaintiff in writing as follows:

"We agree to pay you a commission of eighty-five cents per hundred pounds on all castings made off of the Four Wheel Drive Auto Company's patterns.

"Very truly yours,

"CRUCIBLE STEEL CASTING CO.

"F. A. Lange, President."

The plaintiff further claims that he secured for the defendant the service of making the steel castings for the Auto Company at the instance and request of the Auto Company, with its assent that he was to receive such commission on its orders for castings as defendant agreed to pay him, and that at the date of the commencement of the suit defendant had made for the Auto Company off of its patterns 3,250 tons of castings, upon which there is due plaintiff commissions amounting to $55,250, of which plaintiff has received from defendant $8,011.02. Plaintiff demands judgment for the balance.

The answer of the defendant alleges that until August,

1915, plaintiff was employed by the Auto Company, and while so employed represented to defendant that he would secure for defendant a contract with the Auto Company for the manufacture of steel castings upon the condition that the defendant pay the plaintiff a commission of eighty cents per hundred pounds for such castings so manufactured by defendant from the patterns of the Auto Company during the period of such contract so to be procured by the plaintiff; that the letter produced in plaintiff's complaint was written by defendant to plaintiff; that prior to August 9, 1915, defendant manufactured some sample steel castings for the Auto Company; that on August 9, 1915, defendant and the Auto Company entered into a contract in writing for the manufacture of steel castings in the following terms:

"That in consideration of the covenants and agreements hereinafter mentioned, the first party agrees to make for the second party from patterns to be furnished by the second party, with core boxes for same in good working order, all steel castings required, and the second party agrees to order from said first party all of said above castings required by said second party between the 9th day of August, 1915, and the 1st day of April, 1916, to be delivered by the first party F. O. B. Clintonville, Wisconsin, at seven and one-half cents per pound for all steel castings."

The answer further alleges that after the contract of August 9, 1915, was made, plaintiff ceased to be employed by the Auto Company, and in September, 1915, organized a corporation to manufacture steel castings in competition with the defendant. It is also alleged that prior to March 31, 1916, plaintiff surrendered to the defendant the writing of June 8, 1915, and all rights thereunder, and made no further claim for commissions after the expiration of the contract of August 9, 1915, except as to castings which were ordered on or prior to April 1, 1915. Defendant claims to have paid plaintiff eighty cents per hundred pounds upon all the castings which were manufactured by the defendant for

and delivered to the Auto Company under the contract of August 9, 1915, and covered by the letter of June 8, 1915.

The case was tried before the circuit court. The court determined the suit to be one in equity and triable before the court, but took an advisory verdict of a jury, and a trial was had before the court and a jury. A special verdict was found by the jury. The trial court adopted the verdict of the jury and made its findings and ordered judgment for the plaintiff for the recovery of the commissions claimed to be due at the time of the commencement of the suit. This is an appeal from such judgment.

Edgar L. Wood, attorney, and *Frank M. Hoyt,* of counsel, both of Milwaukee, for the appellant.

Waldemar C. Wehe, Christian Doerfler, and *Walter D. Corrigan,* all of Milwaukee, for the respondent.

The following opinion was filed July 17, 1920:

SIEBECKER, J. The trial court adopted the advisory verdict of the jury as the correct finding upon the issues of fact it embraced. The verdict found, in effect, (1) that it was agreed between the plaintiff and the defendant on or before June 8, 1915, that plaintiff was to receive a commission from defendant on all castings defendant made for the Auto Company off of patterns of the Auto Company; (2) that the commission to be paid was to be the balance remaining after deducting six and one-half cents per pound, plus freight charge to Clintonville, from the price of seven and one-half cents per pound of the castings; (3) that it was not agreed between plaintiff and the Auto Company that plaintiff was to supervise or inspect the castings made by defendant for the Auto Company; (4) that plaintiff returned to Mr. Lange, the president of the defendant company, in March, 1916, the letter of June 8, 1915, upon the express understanding and promise that the defendant would pay plaintiff the commission therein specified as long as the castings were made by

defendant for the Auto Company off of its patterns, and that plaintiff's commission was not to cease upon return of this letter to Mr. Lange. The court found, in addition to these facts, that the Auto Company in May, 1915, authorized plaintiff to place its work for the manufacture of steel castings off of its patterns with the defendant at the price of seven and one-half cents per pound, F. O. B. Clintonville, Wisconsin, and that it was expressly understood and agreed between the Auto Company and plaintiff that plaintiff could arrange with the defendant to receive a commission from defendant for such services upon such terms as might be agreeable, and that the plaintiff at all times, in negotiating for these castings from defendant for the Auto Company, acted in good faith in all his dealings with the president of the defendant and the Auto Company, and that such dealings resulted in delivering the letter of June 8, 1915, by Mr. Lange to plaintiff providing for the commission which plaintiff was to receive from defendant.

It is contended that the trial court erred by applying an erroneous rule of law in making material findings of facts and hence its findings are not entitled to the presumption of correctness in this court. The claim in this respect is that the court erroneously assumed that Mr. Battenberg, the chief engineer and designer of the Auto Company, had authority to sanction the paying of a commission to plaintiff by defendant for the service of placing the Auto Company's orders for steel castings with defendant. We discover no error in the rules of law applied by the trial court in resolving this issue of fact and the issue of fact raised between plaintiff and defendant's president respecting the return of the June 8, 1915, letter in March, 1916. The evidence is clear that Battenberg did not assume to authorize plaintiff to bargain for a commission with defendant. It shows that he conferred with plaintiff about it at Milwaukee, while there to inspect and survey defendant's plant and facilities for the Auto Company, and that upon making his report of the trip to the president of the Auto Company he informed

the president that plaintiff had arranged with the defendant for a commission on the Auto Company's order for castings. The Auto Company was thus fully informed that a contract for commission was made between the plaintiff and the defendant. The subsequent events respecting this commission and the conduct of the president of the Auto Company and of the president of the defendant company amply sustain the conclusion that these officers fully understood that plaintiff was to have a commission. Under these facts and circumstances the contract for commission was a proper one for plaintiff to make.

In view of these transactions the plaintiff was not required to disclose the terms of his commission contract to the Auto Company. The conduct of the officers of the Auto Company clearly shows that they did not require to be informed of the amount of the commissions defendant was willing to pay. Manifestly they were only concerned to secure good castings at seven and one-half cents per pound, and this the plaintiff secured for them.

It is strenuously urged that the court erred in adopting the jury's finding that it was agreed between plaintiff and Lange, as president of the defendant company, in March, 1916, when the plaintiff delivered the letter of June 8, 1915, to Lange, that the commission specified in this letter was to continue on all orders for castings by the Auto Company after March, 1916. The testimony regarding the interviews between plaintiff and Lange resulting in the delivery of this letter to Lange is in sharp conflict. A study of the facts disclosed and the facts and circumstances bearing on this issue persuades us that the jury and trial court are fully sustained in their conclusions to the effect that there was no cancellation of this written contract and that its delivery to Lange was upon the promise and condition that it was to remain in force and cover all future orders for castings by the Auto Company from the defendant. It is apparent that Lange understood that defendant was obligated to pay plaintiff commissions on future orders under the let-

ter of June 8, 1915, and that he took this fact into consideration in his negotiations for a contract for furnishing castings thereafter. This practical construction of the June 8th letter by Lange has the two-fold effect of tending to show that it was intended to be a continuing contract for commission so long as defendant furnished the castings as originally placed with defendant by plaintiff and that it was not canceled in March, 1916. The trial court's conclusions on these points are well sustained by the record and must stand.

Did the plaintiff forfeit his right to the commission by a failure to supervise the making and to inspect the castings? The court and jury found that no such agreement was made with plaintiff for such services in consideration of the commissions paid him by defendant. Upon this question the arrangement between plaintiff and the Auto Company, providing for supervision and inspection of the Auto Company's material and to help expedite deliveries thereof from Milwaukee, must be kept distinct from the transactions between plaintiff and defendant culminating in the commission contract. The employment of plaintiff by the Auto Company to attend to some of its business in Milwaukee was an independent engagement for which *Smith* was to receive $100 a month. It appears that this employment had nothing to do with the arrangements between plaintiff and the defendant for furnishing castings and that the Auto Company terminated this employment of plaintiff in July, 1915. It must also be borne in mind that the plaintiff and defendant arranged this commission contract in June, before it was reduced to writing on June 8, 1915. The evidence fails to show that the supervision and inspection service regarding castings were in any way made the subject of negotiations between plaintiff and Lange for furnishing steel castings to the Auto Company, nor were they a part of the negotiations culminating in the contract for paying the plaintiff a commission if the defendant secured a contract for castings. The evidence shows that the supervision and inspection serv-

ice arose out of the affairs incidental to the contract between defendant and the Auto Company for furnishing the castings and that it was made subsequent to the commission agreement of June 8, 1915. It is not a part nor a condition of the commission agreement between the plaintiff and defendant. From this state of facts it logically follows that any dispute concerning plaintiff's failure of supervision and inspection of the castings defendant furnished the Auto Company does not affect the performance or breach of the commission contract. The court and jury correctly found that these services formed no part of the consideration of the commission contract and that performance of the commission contract did not require that these services be rendered by plaintiff for the Auto Company or the defendant as a condition of recovery by him on the commission contract.

The defendant insists that plaintiff cannot recover on the commission contract because he represented to the Auto Company, through Lange, that the contract had been canceled, and that the Auto Company, relying on such cancellation of the contract, contracted for castings after the expiration of the August 9, 1915, contract, in the belief that plaintiff's commissions were no longer a factor in the prices offered it by defendant. This claim is made on the basis that the plaintiff was guilty of perpetrating fraud on the officers of the Auto Company by deceiving them into a belief that his commission contract had been canceled. The court, as above indicated, however, found that the commission contract had not in fact been canceled by plaintiff and Lange, and that when Lange obtained the letter from plaintiff in March, 1916, it was upon the express understanding that the contract was to remain in force and that plaintiff at all times acted in good faith in all his relations to the defendant and the Auto Company. These facts establish that plaintiff did not participate in any fraud, if any was practiced, in securing the contract for castings from the Auto

Company after April, 1916, and necessarily relieves him from the consequences of such an alleged wrong.

We have above indicated that the record sustains the court in its conclusions that plaintiff did not commit a fraud against the defendant or the Auto Company and that the contract for commissions was a subsisting one, and that it was mutually understood between plaintiff and Lange that it was to apply to castings furnished under contracts subsequent to the one of August 9, 1915. The question arises whether the court properly limited recovery for commissions up to the commencement of this action. The plaintiff offered to amend the complaint to the effect that defendant had furnished the Auto Company castings for which he is entitled to commissions up to the time of the trial of the action. This is an equitable action to obtain an accounting of plaintiff's commissions due under his contract. If any commissions accrued after commencement of the action and before trial, they are a part of the recovery under the contract sought to be enforced in this action. The defendant can in no way be prejudiced by having them ascertained and included in the recovery in this action. Such a procedure will obviate the bringing of another action, expedite the litigation, and save the parties expense. We think the trial court erred in refusing to include recovery of the commissions up to the time of trial. The judgment should therefore be reversed for the purpose of framing the pleadings to include the right of plaintiff to recover the commissions due him under the contract up to the time the accounting prayed for can be had after this case has been remitted to the circuit court. The findings of fact by the circuit court are in all respects affirmed in this court except as to the amount due the plaintiff under his contract.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court for further proceedings as indicated in the opinion, with direction that the court complete the accounting prayed for by the plaintiff and

award him recovery of the amount found due him from defendant.

The appellant moved for a rehearing.

In support of the motion there was a brief by *Edgar L. Wood* of Milwaukee, attorney for the appellant, and *Frank M. Hoyt* of Milwaukee and *P. H. Martin* of Green Bay, of counsel.

In opposition thereto there was a brief by *Waldemar C. Wehe, Christian Doerfler,* and *Walter D. Corrigan,* attorneys for respondent.

The motion was denied, with $25 costs, on September 25, 1920.

STATE EX REL. POLLARD, Appellant, vs. WISCONSIN STATE BOARD OF MEDICAL EXAMINERS, Respondent.

May 10—September 25, 1920.

Physicians and surgeons: Forms of license: Osteopaths: Preliminary educational requirements: Reputable colleges of osteopathy: Statutes: Legislative enactments: Approval by governor after unauthorized material change: Validity.

1. Ch. 438, Laws 1915, provides for but two forms of license: one to practice medicine and surgery, the other to practice osteopathy and surgery. A license to practice surgery alone is not authorized.
2. The preliminary education required by the statute (sec. 1435*a*) of applicants for a license to practice medicine and surgery is not required of applicants for a license to practice osteopathy and surgery, and the board of medical examiners may not refuse to examine an applicant for a license to practice osteopathy and surgery because he has not had the preliminary education required of applicants for a license to practice medicine and surgery.
3. If the substitution of the word "or" for the word "and" in a bill as passed by the legislature when it was presented for the governor's signature was a material change, the bill approved by the governor was not the one passed by the legislature and is a void enactment. If the word "or" be construed to

mean the same as "and," then there is no material change, and, in either event, the enactment worked no change in the law in that particular.

4. To constitute colleges of osteopathy reputable within ch. 438, Laws 1915, as amended, it is not necessary that they require of their students a preliminary college course in addition to a high school education.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Relator brought this action in the circuit court for Dane county praying that a peremptory writ of *mandamus* issue against the *Wisconsin State Board of Medical Examiners* commanding the said board to examine relator in the various branches of surgery which are usually taught in reputable colleges of osteopathy and surgery and which are usually the subject of the regular examinations in surgery of said board, and commanding said board, in the event that relator successfully passes the examination as aforesaid, to issue to him a license to practice surgery in the state of Wisconsin. By its return the medical board sought to justify its refusal to permit relator to take the examination in surgery on the ground that he failed to present to said board satisfactory and competent evidence of having completed a preliminary education required by sec. 1435*a*, Stats., consisting of a two years' college course in physics, chemistry, biology, and either German or French, the equivalent of a two years' premedical course at the University of Wisconsin, which, it alleges, is the preliminary education required of all applicants for the examination in surgery.

It is further alleged in the return that while the petitioner presented evidence that he was a graduate of and held a diploma from the Chicago College of Osteopathy, said college of osteopathy is not a reputable college of osteopathy and surgery defined in sec. 1435*a* of the Statutes, in that said college of osteopathy at the time the relator matriculated as a student therein in 1913, and during the time he attended said college, and at the time of his graduation in June. 1917.

and at this time, did not, and does not, maintain the standard of preliminary education required by the statutes to be demanded of all matriculants of colleges teaching or undertaking to teach the subject of surgery, and that said college did not, at the times referred to, require of its students a preliminary education in addition to the equivalent of graduation from an accredited high school of the state of Wisconsin, the completion of a two years' college course in physics, chemistry, biology, and either German or French, the equivalent of a two years' premedical course at the University of Wisconsin.

The circuit court found that at the time of applying to the *State Board of Medical Examiners* for the privilege of taking the examination in surgery the relator did not present satisfactory and competent evidence of having completed a two years' college course in physics, chemistry, biology, and either German or French, the equivalent of a two years' premedical course at the University of Wisconsin, and entered judgment denying the petition for a writ of *mandamus* and dismissing the action with costs in favor of defendant and against the relator. From this judgment the relator appealed.

For the appellant there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee and *R. T. Jackson* of Mineral Point, and oral argument by *Walter D. Corrigan.*

For the respondent there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, attorneys, and *A. C. Umbreit* of Milwaukee, of counsel, and oral argument by *Mr. Umbreit.*

The following opinion was filed June 1, 1920:

OWEN, J. It is undisputed that relator duly and properly made application to the *Wisconsin State Board of Medical Examiners* to take the examination for osteopathy and surgery at the regular meeting held June 24, 25, and 26, 1919; that the board permitted him to take the examination

in osteopathy and thereafter issued to him a license to practice that art, but that it denied him the privilege of taking the examination in surgery because he did not present competent and satisfactory evidence of possessing the qualifications prescribed by sec. 1435*a* of the Statutes, in that he had not completed a preliminary education consisting of a two years' college course in physics, chemistry, biology, and either German or French, which the board avers to be a prerequisite qualification in order to enable relator to take an examination in surgery. This involves a construction of sec. 1435*a* of the Statutes. That section was created by ch. 438, Laws 1915. Sub. 1 thereof, so far as material here, provides as follows:

"All persons, other than those now possessing a license or a certificate of registration to practice medicine, surgery, osteopathy, midwifery or nursing, desiring, undertaking or attempting in this state to practice medicine, surgery, osteopathy, midwifery or nursing, or any other form or system of treating bodily or mental diseases, ailments, infirmities or injuries of human beings, after the passage and publication of this act, shall apply to said board at the time and place designated by the board, or at any regular meeting thereof, for a license or certificate of registration authorizing such practice, and shall present to such board at the time of so applying satisfactory evidence of having completed a preliminary education equivalent to graduation from an accredited high school of this state; and all persons so applying for a license to practice medicine and surgery after the first day of January, 1919, shall, in addition to such preliminary education equivalent to graduation from an accredited high school of this state, present satisfactory and competent evidence of having completed a two years' college course in physics, chemistry, biology and either German or French, the equivalent of a two years' premedical course at the University of Wisconsin."

Right here it may be noted that ch. 438, Laws 1915, was amended by ch. 595, Laws 1915, and the language just quoted was embodied in the bill culminating in said ch. 595

and passed the legislature with such language therein; but in the bill sent to and approved by the governor there was a variation from the language of the bill as it passed the legislature. The bill sent to and approved by the governor provided that "and all persons so applying for a license to practice medicine *or* surgery after the first day of January, 1919," etc., while the bill as it passed the legislature provided that "and all persons so applying for a license to practice medicine *and* surgery after the first day of January, 1919," etc. In other words, the conjunctive *and* between the words "medicine" and "surgery" as passed by the legislature was changed to *or* in the bill that was sent to and approved by the governor. The change of the conjunctive from *and* as it passed the legislature to *or* as it was approved by the governor was not the result of legislative action of which there is any record, and the only explanation for it is that the change was due to the blunder of a legislative clerk. In this situation, if the substitution of the word *or* for the word *and* be construed as a material change, then it is apparent that the bill approved by the governor was not the one passed by the legislature, and is a void enactment, for the reasons stated in *State v. Wendler,* 94 Wis. 369, 68 N. W. 759. If the word *or* be construed to mean the same as the word *and* for the purposes of the act, then of course there was no material change. But, in either event, the law must be construed to be as created by ch. 438, Laws 1915, which used the conjunctive *and,* and the phrase should read, "for a license to practice medicine *and* surgery after the first day of January, 1919," etc. The law, therefore, is this:

"and all persons so applying for a license to practice medicine and surgery after the first day of January, 1919, shall, in addition to such preliminary education equivalent to graduation from an accredited high school of this state, present satisfactory and competent evidence of having completed a two years' college course in physics, chemistry, biology and either German or French, the equivalent of a

two years' premedical course at the University of Wisconsin."

The question is whether one who makes application for a license to practice osteopathy and surgery must present satisfactory and competent evidence of having completed this two years' college course. Now the statute provides for but two forms of licenses, one to practice "medicine and surgery" and the other to practice "osteopathy and surgery." No license is authorized for the practice of medicine alone or osteopathy alone, or for surgery alone, except by the following provision (sub. 2, sec. 1435*a*):

"Any person duly licensed to practice osteopathy in this state at any time prior to the first day of January, 1916, shall be licensed to practice surgery upon passing the regular examination of the board in surgery, and presenting evidence of having completed an adequate course in surgery at a reputable school or college of osteopathy and surgery requiring not less than twenty months' actual attendance thereat."

The reason for this provision is plain. Prior to the enactment of ch. 438, Laws 1915, persons could be licensed to practice osteopathy alone, but there was no provision by which they could be licensed to practice osteopathy and surgery. By ch. 438, Laws 1915, provision was made for licensing persons to practice osteopathy and surgery. It was a legislative recognition of the fact that schools of osteopathy were properly equipping their graduates for the practice of surgery as well as osteopathy. This, however, left graduates of reputable schools of osteopathy who had theretofore been licensed under our law only for the practice of osteopathy, possessing all the requirements imposed by law for the practice of surgery, without any license therefor. The provision just quoted manifestly was to enable those who had theretofore graduated from a reputable school of osteopathy and who had been licensed under our law to practice osteopathy only, to secure a license to practice surgery

as well as osteopathy, thus placing them on an equality with those who should thereafter graduate from a reputable school of osteopathy. As before stated, ch. 438, Laws 1915, provided for but two forms of licenses: one to practice "medicine and surgery," the other to practice "osteopathy and surgery." To secure either form of license a preliminary education is required, namely, an education "equivalent to graduation from an accredited high school of this state." This is a preliminary education which must be acquired by applicants for a license to practice either medicine and surgery or osteopathy and surgery; but of those applying for a license to practice medicine and surgery a further preliminary education is required by virtue of the following language, already quoted:

"and all persons so applying for a license to practice *medicine and surgery* after the first day of January, 1919, shall, in addition to such preliminary education equivalent to graduation from an accredited high school of this state, present satisfactory and competent evidence of having completed a two years' college course in physics, chemistry, biology and either German or French, the equivalent of a two years' premedical course at the University of Wisconsin."

It seems to us too plain for argument that this additional preliminary education applies only to those who seek a license to practice "medicine and surgery" as distinguished from those desiring a license to practice "osteopathy and surgery." In view of the fact that only two forms of licenses are provided for by the enactment, if it were intended to apply to both forms of license, why limit it to those making application for one form of license, namely, to practice "medicine and surgery"? It is true, no doubt, that those licensed to practice "osteopathy and surgery" should have qualifications in the subject of surgery equal to those licensed to practice "medicine and surgery." But it does not follow that an education for the practice of osteop-

athy should be co-equal with the education required for the practice of medicine. The additional education required of those desiring a license to practice "medicine and surgery" was required, we take it, because in the legislative mind it was deemed a proper equipment for those undertaking the practice of medicine, while not an essential requirement for those proposing to practice either osteopathy or surgery. Our conclusion is that the relator was not required to exhibit to the board satisfactory proof of his having completed the two years' college course.

It is further claimed on the part of the board that the Chicago College of Osteopathy, from which relator graduated, is not a reputable college of osteopathy, because said college does not require of its students a standard of preliminary education equal to the college course aforesaid. This is material because said sec. 1435*a*, as enacted by ch. 438, Laws 1915, provides (sub. 2) that

"Applicants desiring to obtain a license to practice medicine, surgery or osteopathy shall, in addition to the satisfactory evidence of having acquired the preliminary education herein designated, present a diploma from a reputable college or school of medicine and surgery or of osteopathy and surgery; . . . if the applicant be an osteopath he shall submit to an examination in the various branches of osteopathy and surgery usually taught in reputable colleges of osteopathy. A college or school of medicine and surgery or of osteopathy and surgery maintaining the standard of preliminary education hereinbefore designated and requiring at least four courses of eight months each before graduation shall be deemed reputable."

We have already seen that the preliminary education required of one applying for a license to practice osteopathy and surgery is an "education equivalent to graduation from an accredited high school of this state." The additional college course applies only to those desiring to practice medicine and surgery; consequently, in order to constitute colleges of osteopathy reputable under the terms of this law, it

is not necessary that they require of their students the college course in addition to the high school education.

It follows that the college of osteopathy from which relator graduated is in all respects a reputable college; that he presented to the *Wisconsin State Board of Medical Examiners* satisfactory proof of his qualifications in full compliance with sec. 1435*a*, Stats., and that he was entitled to take the examination in the subject of surgery. The peremptory writ of *mandamus* should issue as prayed.

By the Court.—Judgment reversed, and cause remanded with instructions to issue the peremptory writ of *mandamus* as prayed for in relator's petition.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

WORSLEY, Respondent, vs. JOHNSON, Receiver, Appellant.

June 1—September 25, 1920.

Railroads: Accidents at crossings: Contributory negligence: Instructions as to instinct of self-preservation: Special verdict: Duplicity: Presumption.

1. The question whether the driver of a team, who was killed in a collision between his wagon and a trolley car at a railroad crossing, his view being obstructed, was negligent in not stopping and looking, is for the jury.
2. An instruction, in such case, permitting the jury to consider the instinct of self-preservation and the disposition of men in their sober senses to avoid danger, is *held* not to have misled the jury in considering the evidence as to contributory negligence, and was not prejudicial, though the circumstances did not tend to raise the inquiry whether decedent acted recklessly.
3. It must be presumed on appeal that the jury heeded the court's instructions in deliberating on the issues of negligence charged, and unanimously agreed as to one or more, and that the negligence found was the proximate cause of the collision.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Plaintiff brought this action to recover damages for the death of her husband, Franklin W. Worsley. Decedent was killed at about 7 o'clock in the evening of September 19, 1913, at a point on the outskirts of the city of Racine where a public highway known as Asylum avenue crosses the right of way of the defendant company. At the point where the accident occurred the railway tracks run north and south, or very nearly so, while Asylum avenue runs in a northeasterly and southwesterly direction, crossing the tracks at an angle of approximately thirty degrees. The crossing in question is located at the south city limits of Racine, the crossing being partly within and partly without the city. Deceased had been to town with a load of oats and was on his way home, traveling south on Asylum avenue, when the vehicle in which he was driving was struck by a north-bound limited car of defendant company and he was killed.

The complaint alleges that the defendant is a railroad corporation; that Asylum avenue is one of the principal thoroughfares leading into the city of Racine, much frequented by travelers, and that defendant's electric cars cross it at frequent intervals during the day and night; that the car which collided with the wagon of the deceased was being operated at a high and dangerous rate of speed—about fifty miles per hour; that defendant was also guilty of negligence in operating its road and running its cars over this crossing without having any gates or flagman there, or any proper electric bells or other devices installed, as required by the statutes of the state. Plaintiff further asserts that deceased was exercising due care at the time of the accident. Damages are claimed in the sum of $10,000.

The defendant admits that Asylum avenue is an important highway, but denies all negligence charged against it and alleges contributory negligence on the part of the decedent.

The case was tried before the court and a jury. A special

verdict was returned by the jury to the effect that there was a want of ordinary care on the part of the defendant in the operation of its car at the time and place in question; that such want of ordinary care was the proximate cause of the death of plaintiff's husband; that no want of ordinary care on the part of the deceased proximately contributed to cause his death; that plaintiff's damages were $4,000.

Judgment was entered in accordance with the verdict, from which judgment defendant appeals.

For the appellant there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons* of Racine and *Edgar L. Wood* of Milwaukee.

For the respondent there was a brief signed by *Storms, Foley & Beck,* attorneys, and *William W. Storms,* of counsel, all of Racine, and oral argument by *William W. Storms.*

The following opinion was filed July 3, 1920:

SIEBECKER, J. The principal controversy presented on this appeal pertains to the question of decedent's contributory negligence. It is stated in appellant's brief: "It is conceded that upon the issue of defendant's negligence the state of the evidence was such as to make the question one for the jury." An examination of the evidence shows that this question was clearly one for determination by the jury. It is, however, strenuously urged that the undisputed facts of the case convict the decedent of contributory negligence and that the jury's finding that decedent was free from negligence proximately contributing to the injury should have been set aside by the court.

The rule declared in *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823, is invoked as controlling in this case. It is there said respecting the duties of persons approaching railroad crossings:

"The rule here is that the duty to see those dangers that are in plain sight and hear those that are plainly within hearing by paying proper attention thereto, is just as absolute as

is the duty to look and listen for them, and that a jury cannot be permitted to say that a person, called upon to perform that duty, did not see or hear such dangers, and base a verdict thereon."

There is a conflict in the evidence as to whether or not the usual and customary crossing signals, namely, the sounding of the whistle and the ringing of the crossing bell, were given, and whether the crossing lights near the track were in operation. There is also a conflict in the evidence as to whether or not the motorman applied the brake to slacken the speed of the car after the team was in his view on the crossing and whether or not the car was approaching the crossing at a high and dangerous rate of speed. These issues of fact, upon the evidence adduced, were proper inquiries for determination by the jury, and on appeal it must be assumed that the jury resolved them most favorably to plaintiff's claims. In this view the case presents the following conditions: The decedent approached the crossing from a northeasterly direction at about 7 o'clock in the evening of September 18th (a clear evening); he was riding on a lumber wagon, sitting on a seat elevated on a double box; the crossing lights were not lit; no warning signals were given of the approaching car, which was going at a speed of about fifty miles per hour with a headlight that cast a light about 1,000 feet forward on the track; the team was traveling at the rate of about four miles per hour. It appears that the ground in the vicinity of the crossing is practically level and open. One hundred and sixty feet from the Asylum avenue crossing is defendant's station for boarding and alighting from trains; it is located nine feet from the easterly rail of the track on which the car in question was approaching from the south; the station building is eight feet in width and twelve feet long north and south; the trolley poles are six feet to the east from the nearest rail of the track in question and are from a foot to sixteen inches in diameter, placed 1,000 feet apart. About 228 feet to the

south of Asylum avenue is an apple tree, approximately twenty-five feet high, its branches spreading about twenty-four feet and being well branched close to the ground, while 270 feet farther south are two more apple trees of like size. These trees are forty-eight feet from the east track. South of the Durand road crossing, which is 650 feet from Asylum avenue, the railroad tracks curve so that a car cannot be seen from the Asylum avenue crossing until it is near the Durand road crossing. The decedent, approaching the track from the northeast, had his view of an approaching car intercepted by the station building and the trolley poles from a point forty-six feet from the east rail on this crossing until he reached the inner line of the trolley poles. From points eastward of this forty-six-foot intercepted view decedent had an unobstructed view of approaching cars from Asylum avenue for a distance of about ninety feet. If decedent looked for the approaching car within the ninety-foot distance it is not a certainty that he could have seen the car approaching because of the curve of the track. If the jury believed that he looked and saw no car approaching while traveling this ninety feet, then can it be said as a matter of law that he was guilty of contributory negligence in continuing his course upon the forty-six feet of obstructed view before reaching the track, without stopping to ascertain if a car was coming?

It is strenuously argued that the brilliancy of the headlight on the approaching car must have been visible to him after the car passed the curve south of Durand road because it cast its headlight to the crossing for a distance of from 600 to 800 feet. In view of the conditions surrounding him while he traveled the last forty-six feet before reaching the track, it is not clear that ordinary prudence required him to stop and look for approaching cars. These surrounding conditions distinguish the instant case from *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, 67 N. W. 1120, and similar cases where the person approaching the crossing had

an unobstructed view of tracks and approaching trains for considerable distances before entering the zone of danger. We are persuaded that the court properly submitted the issue of decedent's contributory negligence to the jury for determination.

Appellant urges an exception to the following instruction:

"There is no direct evidence as to what deceased did or failed to do in approaching the crossing at the time in question. You are entitled, under the circumstances, to consider the natural instinct of self-preservation and natural disposition which leads men in their sober senses to avoid danger and to preserve life."

While the facts and circumstances disclosed do not tend to raise the inquiry whether decedent acted in reckless disregard of imminent danger, still this instruction upon the issues submitted to them cannot be held to have misled the jury in considering the evidence material to the issue of decedent's contributory negligence, and hence was not prejudicial to the appellant's case. Among the questions requested by defendant to be included in the special verdict is the following: "Was the crossing-signal device operating as the car in question approached the Asylum avenue crossing?" It is urged that the general question submitted, namely, "Was there any want of ordinary care on the part of the defendant in the operation of its car at the time and place in question?" does not inform the court with sufficient certainty upon what grounds the jury found the defendant guilty of negligence, and that the requested inquiry should have been submitted to aid the court in interpreting the verdict.

The court in connection with the issues of the defendant's negligence specifically called attention in its instructions to the various alleged negligences of the defendant and informed the jury that they were to consider all of them in answering the question, thus bringing to their attention the issues of negligence presented by the pleading and the evi-

dence. It must be presumed that the jury heeded these instructions in their deliberation on these issues and that they unanimously agreed that the defendant was negligent in one or more of the respects charged in the complaint, and that the negligence found was the proximate cause of the collision. We discover no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

The following opinion was filed July 10, 1920:

ESCHWEILER, J. (*dissenting*). The defendant requested, which request was denied, that the following question be made a part of the special verdict: "Was the crossing-signal device operating as the car in question approached the Asylum avenue crossing?"

The issue of fact presented by such specific question was a very material one in this action. It formed the substance of one of the specific allegations in plaintiff's complaint of defendant's negligence, and one which it thereupon became incumbent upon plaintiff to prove. It was also important on the question raised by defendant as to the possible contributory negligence of the deceased. For, manifestly, if the signal device described in the testimony was in operation at this crossing as the deceased approached it, and in spite of the warning that would be given to hearing and sight by the operation of such device he continued to drive upon and across the track in the face of the approaching car, such act might well have been held contributory negligence as a matter of law. *Puhr v. C. & N. W. R. Co.* 171 Wis. 154, 176 N. W. 767; *Meissner v. Southern Wis. R. Co.* 160 Wis. 507, 509, 152 N. W. 291.

The importance of this particular question is also emphasized by the fact that under the uncontradicted testimony of plaintiff's own witnesses, after deceased had reached a position on the crossing where, if he had looked, he could not help but see the on-rushing car, no attempt was

made by him to hasten the speed of his team or to do anything whatsoever to avert the disaster.

The majority opinion holds in substance that, under the instructions given by the court on the other questions of the special verdict, the jury must necessarily have considered in their deliberations on those questions this precise question and have determined that it should be answered No, although there were allegations and proof of other grounds upon which the negligence of defendant could have been predicated.

In view of the vital importance that such question had both as to defendant's negligence and that of possible contributory negligence on the part of the deceased, I think it was prejudicial error to refuse to submit such question.

In former decisions, too numerous to cite here, the rule of law has been declared explicitly, forcibly, and repeatedly, that where specific acts of negligence are charged in the complaint, denied by defendant, and litigated on the trial, a special verdict should contain specific questions covering these alleged acts. A reference to a few of such decisions must suffice. *Heddles v. C. & N. W. R. Co.* 74 Wis. 239, 258, 42 N. W. 237; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 362, 77 N. W. 714; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 216, 115 N. W. 865; *Wawrzyniakowski v. Hoffman & Billings M. Co.* 146 Wis. 153, 164, 131 N. W. 429; *John E. DeWolf Co. v. Harvey*, 161 Wis. 535, 547, 154 N. W. 988.

The effect of such former rulings in that regard appears to me to be effectively, although not expressly, done away with by the ruling in the instant case.

I think the issue thus presented in the proposed question was an essential one under the facts in this case to make a proper special verdict, should have been presented, and, in view of the evidence to the effect that such device was in operation at the particular time, refusal to so submit was

prejudicial error for which a new trial should have been granted.

The appellant moved for a rehearing.

In support of the motion there was a brief by *Simmons & Walker* of Racine, attorneys for the appellant, and *Edgar L. Wood* of Milwaukee and *Addison L. Gardner* of Chicago, of counsel.

In opposition thereto there was a brief by *Storms, Foley & Beck,* attorneys for the respondent, and *William W. Storms,* of counsel, all of Racine.

The motion was denied, with $25 costs, on September 25, 1920.

FOX and another, Respondents, vs. BOLDT, Appellant.

June 3—September 25, 1920.

Sales: Warranties implied: Fitness of machine for particular purpose: New or second-hand machine: Parol evidence: Acceptance of machine: Waiver of breach of warranty: Judicial notice of usage of trade: Costs: Failure to comply with rules of supreme court.

1. Where a contract for the sale of a machine was in writing which contained no express warranties, parol evidence was inadmissible to show a verbal warranty; and because of sub. (4), sec. 1684*t*—15, Stats., there was no implied warranty that a specially named engine would develop a particular horse-power or that it was suitable for any purpose.
2. Where a machine is ordered from a dealer in machinery there is an implication that the order is for a new machine, and the contract could not be satisfied by the delivery of a used, second-hand, or rebuilt machine.
3. Even though the purchaser accepted the machine and waived his right to rescind the contract, he was nevertheless entitled to damages for the breach of a warranty that the machine was a new one, and was entitled to a verdict as to the amount which should be applied in diminution or extinction of the purchase price, under sec. 1684*t*—69, Stats.

4. The fact that the purchaser of a tractor, after abandoning it about Thanksgiving Day, tried it out in the following spring on a disk to see if it would do ordinary farm work, with a view of making a proposition to buy it and seeing what it was reasonably worth, did not show an acceptance of the tractor or a waiver of the right to rescind the contract for breach of an implied warranty that the tractor was new.
5. The purchaser of a machine must exercise his option to rescind with promptness on the discovery of a defect which constitutes a breach of warranty.
6. A purchaser of a machine impliedly warranted to be new was entitled to suspend judgment on the question as to whether or not it was new, so long as the seller was endeavoring to make it perform the work which a new one might reasonably be expected to perform, and he was under no obligation to rescind until that time.

On rehearing:

7. Under sec. 1684*t*—15, where one orders from a dealer a specified machine, there is an implied warranty on the part of the dealer that the machine shall be new.
8. The usage of trade that, when a specified machine is ordered, both parties contemplate a new machine, is so universal as to be the subject of judicial notice.
9. Under Supreme Court Rule 44, providing that no costs shall be taxed for printing any case unless the rules of court are complied with, where no attempt has been made by appellant to comply with Rule 6, requiring him to print a case "containing an abridgment of the record, so far as necessary to present the questions for decision," he cannot have costs for printing the case.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover on promissory notes given for the purchase price of a tractor. Defense, breach of warranty. Defendant and his brother formed a partnership, to conduct the business of threshing grain, about August 1, 1918. The brother had an old separator, and it was agreed that he should buy a new 26—46 Case separator and defendant would buy the tractor to run it. Plaintiffs were engaged in the farm machinery business at Platteville. On August 1, 1918, defendant purchased from them a 12—25 H. P.

Fair-Mor tractor. The contract therefor was in the nature of a written order, and was as follows:

Geo. Fox & Sons,	Order No. 204.
Platteville, Wisconsin.	Date sale: Aug. 1, 1918.
Sold to: *Edward Boldt.*	Terms: See terms below.
Address: Platteville,	When wanted: Aug. 5th.
Wisconsin, R. F. D.	Date filled: Aug. 8, 1918.
Ship to customer.	Charge.
Route: Milw. Ry.	

The following goods as per prices and terms on this

1 12—25 H. P. Fair-Mor tractor, F. O. B.
Janesville $1,400 00
Frt. 21 37

$1,421 37

Conditions: The customer is to deposit $100 with order as per attached receipt, and give notes for the following amounts and due at time indicated:

January 1, 1919, $300.
March 1, 1919, $500.
March 1, 1920, $500.

It is understood that customer may make payments in any amount or amounts in advance of due date. As indicated above, the price does not include freight, which is to be paid by customer on receipt at the depot.

Signed, George Fox & Sons, Agent.
Signed, *Edward Boldt,* Purchaser.
Per *Frank L. Fox.*

Platteville, Wisconsin, Aug. 1, 1918. No. 269.
Received from *Ed Boldt,*
Deposit on tractor $100

GEO. FOX & SONS,
By *Free. Fox.*

The tractor arrived at the depot in Platteville August 6th. At that time defendant noticed that the hole in the drawbar was worn. He was told by one of the plaintiffs that this was the result of testing it out at the factory, and for the time being he thought no more of it. The next day the tractor was taken to the farm of one of defendant's

neighbors where they were going to thresh. They started threshing on August 8th, and the engine soon developed a hot-box. The expert who was present to start the engine loosened the boxing and this caused the engine to knock. They ran along about half capacity during the rest of the day. The next day they ran about half capacity with considerable knocking in the engine. On August 12th they ran about half capacity. One of the plaintiffs was there and told defendant that when they got the new separator the tractor would be O. K. He said the belt pulley on the cylinder of the old separator was too small. The engine was still knocking and the kerosene pump leaked. Plaintiffs put on a new pump. There was considerable spark-plug trouble, overheating, and knocking on the 13th and 14th of August.

Owing to rain they did no more threshing until August 20th, when they could not start the engine. They telephoned plaintiffs and one of them came out, took some gasoline from his car, and started the tractor at about 11:30. They kept the tractor running over the noon hour, and continued to thresh about half capacity. The next day they had considerable spark-plug trouble and defendant went to Platteville and got a new set of spark plugs, which did not seem to remedy the trouble. One of the plaintiffs said they would fix the tractor so that it would run in good shape, and just as soon as the new separator came everything would be O. K. The new separator came August 23d. The tractor did not work any better on the new separator. *Fox* was notified, and he said "We will fix it so it will pull the insides out of the new separator."

On August 28th Mr. Townsend, designer of the tractor and manager of the Townsend Manufacturing Company, which manufactured the same, came out to fix the tractor. He worked on the engine all day. He recommended a new drive pulley on the separator two inches smaller than the one they were using. They got the pulley he recommended

and ran along on August 29th until 4:30, when the intake valve in the engine broke. They could not use the tractor until the intake valve was finally replaced on September 10th. In the meantime they ran the separator with a fifteen horse-power portable engine. This engine ran it in first-class shape.

There was no threshing between September 10th and September 16th because of wet weather. They then attempted to move the separator with the tractor. *Freeling Fox* was operating the tractor, and, going down a hill, threw out the clutch and broke both clutches on the drive gear. The clutch sleeve had too much play on the crank shaft. It was worn too much and was too loose. New clutches came and were put on on the 18th. On the 19th they started to thresh. It ran fairly well, feeding it a little over half capacity. No more threshing was done until September 30th. They could not get the engine started until half-past 10 o'clock, and after it was started it did not seem to develop any power at all. *Fox* was notified and he said he would get a man out from the factory to fix it. He did not come until the middle of October. He looked the engine over and said the cylinder-head was leaking water into the kerosene pump and sent the old cylinder-head back to the factory and a new one was sent from the factory to take its place. About a week later a representative came from the factory and put the new cylinder-head on and said, "When you are ready to thresh we will come out and run this for you and see that it runs all right." He came again the Tuesday before Thanksgiving (no threshing having been done in the meantime), put on a new carburetor, started out about 8:30, ran along all morning and threshed ninety-five bushels. About 11:30 he was adjusting some part of the engine and the belt pulley ran tight. In attempting to get the belt pulley off he broke it to pieces. He said, "Now we are done." There were four stacks of grain open, and defendant said, "Now we will have to go and hire another

tractor." He said, "All right, go and get another one; I have done all I can do, but I see that I can't pull it." Three days later defendant saw one of the plaintiffs and told him to get the tractor; that he was perfectly satisfied that it could not do the work and he was through with it.

As matter of defense defendant alleged that plaintiffs warranted that the tractor would run and operate a 26—46 grain separator; that the horse-power of the engine was 12—25, 12 tractor pull draw-bar, 25 by belt, and that it was agreed that plaintiffs would give defendant a written warranty that the tractor would run and operate said 26—46 separator; and by way of counterclaim it was alleged that the written contract between the parties failed to express their agreement in that it did not include such warranty, and reformation thereof was prayed so that it should express the warranty as above stated. It was also alleged that the tractor was a second-hand tractor.

At the close of the evidence the court directed a verdict in favor of the plaintiffs, for reasons which will more fully appear in the opinion. From the judgment entered on such verdict the defendant brings this appeal.

Jesse J. Ruble of Platteville, for the appellant.

For the respondents there was a brief by *Kopp & Brunckhorst* of Platteville, and oral argument by *L. A. Brunckhorst.*

The following opinion was filed July 3, 1920:

OWEN, J. The contract between the parties was in writing. It contained no express warranty, and parol evidence to show a verbal warranty was not admissible. *Ohio E. Co. v. Wis.-Minn. L. & P. Co.* 161 Wis. 632, 155 N. W. 112. The statute (sub. (4), sec. 1684*t*—15) provides that "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." There was therefore no warranty that the engine would de-

velop any particular horse-power or that it was suitable for any purpose, either express or implied, coupled with the contract of sale. The contract, however, called for a new tractor. While this is not so specifically stated in the written order therefor which constitutes the contract between the parties, it is nevertheless implied from the circumstances of the case. Where a farmer orders a certain machine from a dealer in machinery there is an implication that the order is for a new machine, and the contract cannot be satisfied by the delivery of a used, second-hand, or rebuilt machine (*Grieb v. Cole,* 60 Mich. 397, 27 N. W. 579), and there is an implied warranty that the machine delivered pursuant to the order is a new machine.

Defendant alleged in his answer that the tractor delivered to him was a second-hand tractor, and he contends that the evidence is sufficient to take this question to the jury. The evidence upon this question is necessarily circumstantial. The machine was newly painted and in every respect had the appearance of a new machine. The evidence justifying the inference that the tractor was a second-hand machine may be briefly stated as follows: It is claimed that the machine was rated as a 12—25 horse-power tractor. This is indicated by its name—"12—25 H. P. Fair-Mor Tractor." While it must be held that no implied warranty results as between the parties to this action that the tractor was of 12—25 horse-power, nevertheless it is the inference that would naturally arise from the designation. The president of the Townsend Manufacturing Company, which company manufactured the tractor, did not deny that it was designed to be a 12—25 horse-power tractor. The letter written by the Fairbanks-Morse Company, distributor of the tractor, to the defendant rather assumes that such was its rating. In their letter they say: "We understand you claim the engine will not develop its rated H. P., and the Townsend Mfg. Co. seem willing to make a test to prove that the engine is up to guaranty in this respect." So while there cannot be said to

be a warranty as between the parties to this action that the tractor was a 12—25 horse-power tractor, it may be assumed that the defendant considered that he was getting a tractor of that horse-power and the manufacturer thereof so rated it. There is evidence in the case that this tractor did not do the work ordinarily done and which may be expected to be done by an engine of that rated power. There is evidence in the case justifying the conclusion that an engine of that power would satisfactorily operate defendant's separator. The evidence is quite conclusive that it failed to do so and that it was unable to satisfactorily operate the separator when fed at more than about half capacity. Besides its failure to satisfactorily run the separator, there is evidence to show that it did not display the power of a 12—25 horse-power engine in hauling the separator over the road. It failed to pull the separator up a hill where a 10—20 engine had pulled the same separator. This lack of power strongly indicates that something was wrong with the engine. In addition to this, we have what the designer of the tractor and the president of the company manufacturing the same terms an unusual number of replacements. These replacements consisted of a pump, cylinder-head, intake valve, new clutches, magneto, spark plugs, and cable.

Breakages and replacements are not ordinarily expected of a new machine. They are to be expected from the use of an old machine. To be sure, Mr. Townsend attributed the cause of these breakages to the fact that the engine was overloaded. It is significant, however, that he did not so inform the defendant at the time he was endeavoring to make the engine operate the separator. Neither he nor any of the experts nor either of the plaintiffs told the defendant that the engine was of insufficient horse-power to properly operate the separator. On the contrary, one of the plaintiffs assured the defendant that they would fix the engine so that "it would pull the insides out of that separator." The conclusion of Mr. Townsend, therefore, that the number of

breakages was the result of overloading the engine must be substantially discounted by the fact that his conduct in endeavoring to make the engine do the work was inconsistent with the idea that the work imposed upon it was excessive for its rated horse-power. It is also a significant fact that the replacements were all readily and willingly made by the plaintiffs without charge to the defendant. Of course it may be admitted that a new machine sometimes behaves just as this tractor did. It is submitted, however, that it was the behavior of an old and worn machine rather than that of a new one. In addition to these circumstances there is positive evidence of prior use of the machine. One of the plaintiffs testified that they furnished a new cable because the old one had become oil-soaked. If a cable would become so oil-soaked as to require replacement by a new one during the short period of time that this tractor was in operation, it seems certain that they are short-lived. Both clutches on the drive gear broke. The defendant testified: "The clutch sleeve had too much play on the crank shaft; *it was worn and much too loose.*" The hole in the drawbar showed wear. This was admitted by the plaintiffs, who said it was the result of testing it at the factory. The cylinder-head leaked water into the kerosene pump—a result hardly to be expected from a new engine. "It always missed on that one cylinder just as soon as it got to pulling, and it never did yet and never will work on that," according to the testimony of one of defendant's witnesses who worked with him in the operation of the threshing outfit. We think the evidence was sufficient to take to the jury the question of whether the tractor delivered in fulfilment of the order was a new or second-hand machine.

We do not know what view the trial court took of this feature of the case. According to the statement of the trial judge, he directed a verdict because the defendant had accepted the machine and had waived his right to rescind the contract. But even though the defendant did accept the

machine and waived his right to rescind the contract, he was nevertheless entitled to damages for the breach of the warranty that the tractor was a new machine, and was entitled to a verdict as to the amount, which should be applied in diminution or extinction of the purchase price. Sec. 1684*t*—69, Stats. But, upon the evidence, we do not think it can be held, as a matter of law, that the defendant had lost his right to rescind for breach of warranty. It is without dispute that within three days of the time he was told by a representative of the company on or about Thanksgiving Day that he could do nothing further to make the engine operate the separator, the defendant told one of the plaintiffs to get the tractor, that he was through with it. Plaintiffs themselves admit the substance of such a conversation, but are uncertain as to the date. They do, however, fix it as sometime during the month of December. Failing to secure satisfaction from the plaintiffs, he wrote to Fairbanks-Morse Company, the distributor of the engine, in March, as set forth in the statement of facts. He made no use of the engine whatever from the time it was abandoned, about Thanksgiving Day, except that during the following spring he tried it on a disk to see if it would do ordinary farm work, with a view of making a proposition to buy the tractor and pay what it was reasonably worth. This use of the tractor was in the nature of a test and could not be construed as an acceptance thereof. *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669; *Kelsey v. J. W. Ringrose Net Co.* 152 Wis. 499, 140 N. W. 66.

It is the settled law, of course, that the purchaser must exercise his option to rescind with promptness upon the discovery of the defect which constitutes the breach of warranty. Assuming that the tractor delivered was second-hand, there was no way by which that fact could be discovered except by use thereof. It was not patent upon mere observation or casual inspection. The worn hole in the drawbar was the only patent evidence of its prior use.

With reference to this, however, the defendant received the assurance of one of the plaintiffs that it was the result of testing it out in the factory. The subsequent experience was but cumulative evidence tending to justify the conclusion that the tractor had had prior usage. The defendant was entitled to suspend judgment upon the question so long as plaintiffs were endeavoring to make the engine perform the work which it seems it might reasonably be expected to perform, and he was under no obligations to rescind until that time.

We therefore think the trial court was in error in not submitting the case to the jury upon the questions herein indicated, for which reason there must be a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

On September 25, 1920, a motion for a rehearing was denied, with $25 costs, and the following opinion was filed September 28, 1920:

OWEN, J. Upon a motion for rehearing, respondents insist that the court erred in holding that there was an implied warranty that the tractor delivered was a new machine, on the ground that there is no implied warranty of quality or fitness, except as specified in sec. 1684*t*—15, Stats., which does not include the warranty declared in the opinion of the court. This contention seems to merit a response from the court. We suggest, however, that, if the contention were sound, there is little likelihood that it would affect the result. No honest or fair-dealing man would sanction for a moment, as sound or just, a proposition of law that would turn out of court as remediless one who has received from a dealer in machinery a second-hand machine in fulfilment of an order for a new machine. An attempt to palm off a second-hand machine on a purchaser under such circumstances is fraud, if nothing else, and the principles of that

branch of the law may be readily invoked to protect the purchaser if no other remedy exists.

However, we think the statute, sec. 1684*t*—15, imports into the transaction the implied warranty declared in the opinion of the court. That section provides: "An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade." Where one orders from a dealer in machinery a specified machine he expects a new and not an old or second-hand machine, unless a second-hand machine is specifically mentioned in the order. A new machine is within the contemplation of both parties. This is so universal as to constitute a usage of trade of which this court will not hesitate to take judicial notice. By virtue of this usage of trade the contract of sale of the tractor in question was coupled with a warranty as to the quality of the tractor delivered, viz. that it was a new tractor. Because of the seeming confidence with which respondents' attorneys challenge the conclusion of the court in this respect, we take this occasion to indicate that our conclusion was not arrived at without due appreciation of the provisions of the statute relied upon to establish its fallacy. As no other contentions made on the motion for rehearing are considered of sufficient merit to require special mention, it follows that the motion for rehearing must be denied.

The mandate, however, should be modified so as to deny costs to appellant for printing the case. Rule 6 of this court requires the appellant to print a case "containing an abridgment of the record, so far as necessary to present the questions for decision." Rule 44 provides that "No costs shall be taxed for printing any case, supplemental case, or brief unless these rules shall have been complied with." The entire bill of exceptions was printed verbatim in the printed case. No attempt at abridgment was made. The provisions of Rule 6 were utterly ignored. The mandate of the court is therefore modified so as to provide that appellant shall have no costs for printing the case.

WILL OF OSWALD: STEADWELL, Appellant, vs. KEYES, Respondent.

June 3—September 25, 1920.

Wills: Revocation by destruction: Will in possession of testatrix not found after death: Presumption: Declarations of testatrix: Witnesses: Competency: Transactions with deceased person: Husband as witness for wife: Appeal: Weight accorded findings of trial court.

1. On appeal in a will case involving the question whether or not a will had been revoked by its destruction by decedent, due deference must be given to the opinion of the trial court as to the weight and credibility of evidence given by witnesses in his presence.
2. Under sec. 4069, Stats., relating to transactions with deceased persons, an interested witness could not testify that the deceased burned the will in her presence in a basin procured by such witness for the deceased.
3. Where it is established that testatrix properly executed a valid will and that the same was last known to be in her possession but cannot be found on her death, a *prima facie* presumption arises that she destroyed it with the intention of revoking it. *Valentine's Will,* 93 Wis. 45, followed.
4. The husband of an interested party in a will contest is competent, under sec. 4072, Stats., to testify in favor of his wife concerning the destruction of the will by decedent.
5. Declarations of the testatrix that she had destroyed her will and had sold and given away everything she had, and directions to a witness as to whom she wanted him to give certain things, were competent as tending to prove that deceased died in the belief that she left no will, and thus support a presumption of revocation arising from the fact that the will was last seen in her possession and could not be found after her death.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Marion Oswald died February 2, 1918, in the city of La Crosse, where she had for many years maintained a woman's apparel shop. She had suffered from cancer for several years preceding her death, and in 1917 had an operation because of that condition. Towards the end of

1918 she grew worse and went to live with her sister, *Mrs. Steadwell.* After her death *Mrs. Steadwell* filed a petition in the county court of La Crosse county asking for administration of decedent's estate as an intestate estate. *Mrs. Keyes,* another sister of deceased, filed a petition alleging in substance that Marion Oswald had died testate but that the will had been lost or hidden, and asked the county court to establish the will. The county court denied the petition of *Mrs. Keyes* and granted the petition of *Mrs. Steadwell* for the administration of the estate as an intestate estate. *Mrs. Keyes* then appealed to the circuit court, where a trial was had upon the issues raised by the parties in the county court. The circuit court upon the evidence adduced found that on January 17, 1918, Marion Oswald had legally executed a will in which she had bequeathed all her property to her sister, *Mattie Keyes,* who was also named executrix, and that the testatrix never altered, destroyed, or revoked the will, and died in the belief that she had left a valid and existing will. The court also found that Miss Oswald never authorized any one to withdraw her will from the office of her attorneys, where she had left it; that nevertheless the will was withdrawn without her knowledge, and was lost or destroyed by accident or design.

Judgment was entered reversing the decision of the county court and directing probate of the will as a lost will. This is an appeal from such judgment.

For the appellant there was a brief by *Hartwell & Cowie* and *Cowie & Hale,* all of La Crosse, and *Otjen & Otjen* and *A. H. Bartelt,* all of Milwaukee; and the cause was argued orally by *Robert S. Cowie* and *Henry H. Otjen.*

Jesse E. Higbee of La Crosse, for the respondent.

The following opinion was filed July 3, 1920:

SIEBECKER, J. The important question for determination is, Did the court err in finding that decedent's will was not revoked by her during her lifetime? The court concluded that the testimony of *Mrs. Steadwell,* decedent's sis-

ter, who testified that the decedent had revoked her will by burning it in the presence of the witness, must be disregarded for two reasons: (1) because it related to a personal transaction with deceased and hence was incompetent; (2) because he regarded her testimony as so completely impeached that it could not be given any weight and probative effect. The trial court's opportunity to ascertain the weight and credibility of evidence given by witnesses in his presence is superior to that of this court, and due deference to the opinion of the trial judge on this point is not to be disregarded in a review of his findings of fact in the case.

An examination of the record raises a doubt in our minds regarding the trial court's conclusion that the witness *Mrs. Steadwell* is so overwhelmingly impeached as to require rejection of her testimony on that ground. We think, however, that the transaction testified to by this witness regarding the burning of the will by the deceased sister in the presence of the witness amounts to a personal transaction with deceased and must be excluded as incompetent evidence under sec. 4069, Stats. The witness testifies that she was present and alone with her sister in the room during the alleged burning of the will by the deceased and that she saw her tear and set fire to the document, and that it was finally consumed in a granite basin near decedent's bed. The witness states that she had procured this granite basin for the deceased. The witness's acts thus disclosed by her are so closely related to what she testifies the decedent then did in her presence that it brings her testimony within the prohibitions of sec. 4069, Stats., as a transaction with the deceased, and is therefore incompetent evidence.

The question recurs, Does the competent evidence in the case sustain the court's finding that decedent's will was not revoked? The evidence must be considered in view of the rule stated in *Valentine's Will*, 93 Wis. 45, 67 N. W. 12:

"Where, as here, it is established that the testatrix properly executed a will, and that the same was last known to be in her possession but cannot be found on her death, there

is a *prima facie* presumption that she destroyed it with the intention of revoking it, but such presumption may be overcome by competent evidence."

An important inquiry is, When was the will last in decedent's possession? It is claimed by proponent, and the court so found, that the will did not come into her possession after depositing it with her attorneys for safe-keeping at the time of its execution in June, 1917. It appears without dispute that this will did leave the possession of the attorneys on the 28th or 29th of January, 1918. The evidence is also clear that the attorneys' clerk mailed it from their office and addressed it to decedent at the residence of the Steadwells. An examination of all the evidence leaves no room for doubt on this point. The fact that it was received at the Steadwell home, where decedent was then being cared for in her last sickness, is testified to by Mr. Steadwell, husband of decedent's sister. He testifies that on January 29th or 30th he was called from his office to his home to give decedent a treatment to relieve her difficult breathing; that he prepared for this treatment, and that as he passed from the kitchen through the sitting room on his way upstairs to decedent's bedside he saw three or four letters addressed to her on the library table, and among them a letter from Morris & Hartwell, attorneys, who had custody of her will. It was a large envelope, such as the attorneys' clerk described as the one into which she put the will, addressed it to the decedent at the Steadwell home, and then mailed it. The competency of Mr. Steadwell as a witness under sec. 4072, Stats., cannot be doubted. He states: "I gave that envelope to Miss Oswald with the other mail." He also testifies in detail that on the Friday following this transaction decedent requested him to stay with her, that he did so, and that decedent then told him about having made the will in question, and that she had destroyed it "because she couldn't let it stand as it was," and that she

informed him that she had sold and given away everything she had, and instructed and directed him to whom to give the things she specified. These declarations are competent evidence, as the trial court held, as tending "to prove that she died in the belief that she left no will, and thus supports the presumption of revocation arising from the fact that it was last known to be in her possession, but could not be found in her possession." *Valentine's Will,* 93 Wis. 45, 67 N. W. 12. We are persuaded that the court clearly erred in concluding that the will did not come to decedent's possession after its execution. All the positive evidence tends to show that she received it. This testimony is not disputed by any direct testimony, nor is it impeached by facts and circumstances bearing on this issue. The inference from the evidence clearly tends to prove that the will in question came into decedent's possession in an envelope from the office of Morris & Hartwell through the mail and that it was delivered to her. That it could not be found upon her death is undisputed. In addition to these facts, the evidentiary facts and circumstances tend to support the presumption that decedent revoked the will by destroying it. We have read and examined the evidence and cannot find any justifiable grounds for saying that it discloses facts which show that the will in question was lost or destroyed by accident or design. It is considered that the presumption that decedent revoked this will after it came into her possession has not been rebutted. This fact of revocation of the will being thus established, all other questions suggested are immaterial.

From the foregoing it follows that the judgment of the circuit court decreeing that the will of Marion Oswald was not revoked or canceled by her must be reversed, and that the circuit court must affirm the decree of the county court declaring that Marion Oswald died intestate.

By the Court.—The judgment appealed from is reversed,

and the cause remanded to the circuit court with direction to affirm the judgment of the county court of La Crosse county and remand the record to such county court for further proceedings according to law.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

MAINE, Appellant, vs. MARYLAND CASUALTY COMPANY and another, Respondents.

June 4—September 25, 1920.

Witnesses: Form of objection to incompetency: Privilege in respect to testimony of physician: Waiver by patient: Implied waiver: Waiver by personal representative or beneficiary in insurance policy: Hearsay.

1. Objections not expressly directed to the incompetency of physicians as witnesses, but rather to the incompetency of their testimony, will be considered on appeal where both court and counsel were apprised of the statute relied upon and it is clear that the questions were squarely presented to the trial court.
2. Sec. 4075, Stats., prohibiting a physician from testifying as to information acquired professionally from a patient, was enacted for the benefit of the patient, and the protection or privilege accorded the patient thereby may be waived by him; but it cannot be waived by administrators, executors, or personal representatives of the patient or by a beneficiary under his insurance policy.
3. In an action on an accident policy which involved the question whether the death of the insured was the result of an accident, the testimony of physicians who attended him is incompetent, under sec. 4075, the protection of such statute not having been impliedly waived by the insured on taking out the policy merely because of the possibility of the need of such testimony in an action on the policy following the death of the insured.
4. Declarations of the insured to his physicians, made some days subsequent to the accident, as to the cause of injury, are inadmissible, being hearsay and not a part of the *res gestæ*.

OWEN and SIEBECKER, JJ., dissent.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action is to recover on a policy of accident insurance. The plaintiff is the widow and beneficiary under said policy of C. D. Maine, the insured, who it is claimed was injured on November 14, 1918, resulting in his death thirteen days later.

The decedent on the day in question moved a heavy icebox on a neighbor's premises. On the following day he gave an indication of pain in his side by frequently placing his hand there when standing up. Two days after the accident he lay down on a couch during the daytime, complaining of pain in the same place, which appeared to be over the gall duct on the right side of the abdomen. Shortly thereafter he was attended by physicians, and on November 21st was taken to the hospital and there operated upon.

The medical testimony shows that, prior to being sent to the hospital, the diagnosis of some of the physicians was that there was an infection of the gall bladder. The operation disclosed, however, that a part of the omentum, which is a part of the peritoneum or membrane lining of the abdominal cavity, had become gangrenous to an extent about the size of the palm of a hand. This portion was removed, but subsequently there developed a paralysis of the muscles in the walls of the intestines and a secondary operation was performed. The distention of the bowels caused by such paralysis increased and he died on November 27th as a result thereof.

The testimony indicated that such condition of the membrane was probably produced by a twisting as the result of some violent physical strain on or of the patient's body.

Under the testimony received by the court under its first ruling there was evidence that the deceased had at several times, but more than two days after the accident, stated to the attending physicians who were then treating him professionally that he had twisted himself at the time he was

moving the ice-box on November 14th and that he attributed the subsequent pain to such twisting.

The physicians further testified that considering what was disclosed at the operations and the autopsy, taken in connection with the statements that the deceased made to them as to the moving of the ice-box, they ascribed the cause of his death as being traceable to such injury.

A motion was made by the defendant to strike out the testimony of such physicians, which was granted, and thereupon the defendant moved for a directed verdict in its favor, which the court granted "solely upon the ground that the only evidence of the accident which is claimed was the proximate cause of the deceased's death is the statements of the physicians and surgeons who were called to treat him and to operate upon him, and the court being of the opinion that such testimony was incompetent because of the privilege, under sec. 4075 of our Statutes, that there is no evidence to sustain the claim of the plaintiff to the effect that there was an accident within the meaning of the terms of the policy."

The policy in suit contained the following:

"Affirmative proof of death, or loss of limb or sight, or duration of disability, must be furnished to the company within two months from the time of death, or loss of limb or sight, or termination of disability for which the company is liable. No suit for recovery hereunder may be brought until after three months from the date of filing final proofs at the company's home office. . . ."

"14. The company shall have the right and opportunity to examine the person of the assured or beneficiary when and so often as it requires in case of injury and also the right and opportunity to make an autopsy in case of death."

From a judgment of dismissal of the complaint upon the merits plaintiff has appealed.

For the appellant there was a brief by *Winter, Morris, Esch & Holmes* of La Crosse, and oral argument by *Frank Winter.*

For the respondents there was a brief by *George H. Gordon, Law & Gordon* of La Crosse and *James E. Coleman* of Milwaukee, and oral argument by *George H. Gordon.*

The following opinion was filed June 23, 1920:

ESCHWEILER, J. It is conceded in this case that there is no evidence in the record sufficient to support a verdict for the plaintiff upon the accident insurance policy in suit except and unless the testimony of physicians who attended the deceased subsequent to November 14th as to what was disclosed by the surgical operations performed by them, and including statements made by him to them concerning the alleged twisting or injury sustained in the moving of the ice-box, was erroneously stricken out. The trial court excluded it under the following portion of sec. 4075, Stats.:

"No person duly authorized to practice physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon."

Appellant contends that the defendant should be prevented from asserting any right under such statutory provision, first, because of want of proper objection either to the competency of such physicians to testify as witnesses or to their testimony as it was being received; and secondly, because it must be considered that the exclusion of such testimony under said sec. 4075, being a privilege accorded the patient, was one that might be waived, and under the situation in this case was so waived.

We do not deem it necessary to recite in detail the manner and form in which the offered testimony on the points here in issue was objected to by the defendant from time to time as the same was being offered and was at first received. Objections were interposed as to the competency of the evidence on the ground of privilege, and also in a form in-

dicating that some of such objections were based upon the ground that the statements by the deceased as to the alleged accident on November 14th, made some considerable time thereafter, were not parts of the *res gestæ*. That the objections were intended to be to the incompetency of the witnesses to testify rather than to the incompetency of their testimony, was perhaps not so precisely or concretely stated during the earlier stages of the trial as might have been advisable, but it is rendered immaterial in the disposition of this case for the reason that court and counsel were apprised that reliance was being expressly placed by defendant upon the section of the statute above quoted.

Upon subsequent motions made by defendant and the action of the trial court, it is clear that the questions now considered were squarely presented to the trial court, so that the first objection raised by appellant on this appeal as to the form of defendant's objections to this testimony must be overruled.

Although sec. 4075, Stats., *supra,* makes no exception in terms as to the application of the peremptory language of the statute excluding the testimony of physicians or surgeons as to information received by them professionally from a patient, yet it is also well established that such statutory provision, being intended as a protection to the patient rather than a mere inhibition to the physician, is a protection or privilege that may be waived by him for whose benefit it is deemed to have been enacted, and therefore such testimony may, notwithstanding the statute, be admitted, it satisfactorily appearing that the patient's privilege has been waived. *McGinty v. Brotherhood of Railway Trainmen,* 166 Wis. 83, 89, 164 N. W. 249; *Will of Hunt,* 122 Wis. 460, 469, 100 N. W. 874.

There was no express waiver by the patient in this instance, and it cannot be waived by the administrators, executors, or personal representatives of the deceased nor by any person standing in the position towards deceased such as

does the plaintiff beneficiary under the policy in suit. *Casson v. Schoenfeld,* 166 Wis. 401, 413, 166 N. W. 23.

It is urged, however, and largely from the standpoint of the probable injustice that will otherwise result in this instance as well as in similar situations, that under the facts in this case it was intended by the insured that there should be a waiver of such privilege from his taking out such an accident policy, in that the very nature of the contract necessarily implies that it was anticipated that in case of accident the testimony of attending physicians or surgeons would be required in order to establish a right to recover either for the insured himself in case of an injury not resulting in his death, or for the designated beneficiary in case such injury resulted in death.

It is further urged that the contract of insurance, providing as it does on its face for the furnishing by the insured or his beneficiary, respectively, of satisfactory proofs of injury or death, also indicates an intention on the part of the insured that the statutory exclusion of such material testimony as was being offered in this case was to be lifted and waived by the insured. Plaintiff also insists that in view of the conditions inserted for defendant's benefit in this contract, namely, those requiring statutory proofs of death, necessarily requiring the statement or evidence of physicians, and the further provision for the examination of the body of the insured under the clauses set forth in the statement of facts above, should prevent it from now asserting any benefits from a privilege belonging to the insured and not to the defendant or the witnesses themselves.

That such a statute as well as others that the state has adopted, on the ground of public policy, for the exclusion of testimony involving information acquired in such confidential relationships as that between physician and patient, lawyer and client, minister and penitent, undoubtedly does in particular instances result in the defeat of meritorious and just claims, may well make us hesitate but cannot per-

mit us to do otherwise than uphold the law as it has been written. It must not be overlooked that such a privilege is somewhat of a double-edged sword, in that such patient could not waive his privilege so as to have admitted testimony elicited from a physician that was favorable to the patient's side of any controversy and at the same time insist upon the statute for the exclusion of further testimony on cross-examination or otherwise which might prove harmful to his cause. If the bars are lowered for and by him, they must be kept lowered for the opposite party.

Were such statute only for the benefit of parties situated towards the patient as is the defendant in this case, then there would be much force to the argument that such contract provisions should be held to be a waiver by it of such privilege. The possibility, however, of need of such testimony on any action on such an insurance policy does not justify, in our judgment, a conclusion that the patient himself, in the making of such a contract, thereby impliedly writes into it a waiver on his part of such statutory privilege, which privilege, if thus waived by him, would necessarily be waived as against him if alive, or against his memory or reputation if dead.

The trial court was therefore right in ruling as he did that the information obtained by the medical witnesses while attending, prescribing for, and operating upon the patient was excluded and not permitted to be received in evidence by force of sec. 4075, *supra*.

Much of the apparent hardship resulting in this case from a dismissal of plaintiff's cause of action, however, necessarily results from the application of another well established rule of evidence not dependent upon the statute.

The testimony of the physicians so excluded in this case on all the other points on which it was offered would have been of no avail and weight unless there could have been connected with such testimony the declarations of the deceased, made some days subsequent to the accident to these same physicians, that he did injure himself by the moving

of the ice-box. Such declarations were clearly no part of the *res gestæ,* were hearsay and inadmissible. *Hall v. American M. A. Asso.* 86 Wis. 518, 525, 57 N. W. 366; *Brahmsteadt v. Mystic Workers of the World,* 152 Wis. 580, 582, 140 N. W. 354; *Andrews v. U. S. C. Co.* 154 Wis. 82, 87, 142 N. W. 487; *Ætna L. Ins. Co. v. Ryan,* 255 Fed. 483; *Globe Acc. Ins. Co. v. Gerisch,* 163 Ill. 625, 627, 45 N. E. 563; *Budde v. Nat. Trav. Ben. Asso.* 184 Iowa, 1219, 169 N. W. 766; Jones, Ev. (2d ed.) § 345; 1 Corp. Jur. 500.

Recitals of past events made by an interested person are no more admissible because made to physicians or surgeons, even when necessarily so made for the purpose of proper treatment by them, than if made to other persons. *Keller v. Gilman,* 93 Wis. 9, 11, 66 N. W. 800; *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 511, 99 N. W. 217; *Peoria C. Co. v. Industrial Board,* 284 Ill. 90, 93, 119 N. E. 996; *Maryland C. Co. v. McCallum,* 200 Ala. 154, 75 South. 902; 1 Corp. Jur. 500.

By the Court.—Judgment affirmed.

The following opinion was filed July 15, 1920:

OWEN, J. (*dissenting*). The result of this litigation should cause the legislative mind most serious reflection. A husband, with most commendable prudence and foresight, purchased an accident insurance policy which provided for the payment of $5,000 to his widow in case of death resulting from bodily injuries. Death occurred by reason of bodily injuries, and she seeks to recover on the insurance policy. In order to establish the causal relation between the bodily injuries and the death, the testimony of his attending physician is essential. That testimony is declared incompetent and is not received by reason of the provisions of sec. 4075, Stats., which provides:

"No person duly authorized to practice physic or surgery shall be permitted to disclose any information which he may

have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon."

It is suggested that the legislature can, with much profit, in a consideration of the wisdom of this enactment, balance equivalents with a view of determining whether this statute is promotive or destructive of justice.

The rule did not obtain at common law. It had its origin in the state of New York, and has been adopted by approximately one half of the states of this country. It is said that it was enacted for the purpose of encouraging patients to disclose fully their ailments to their attending physicians without apprehension that their statements so made could be disclosed upon the witness stand to their humiliation and disgrace. As compared with the innumerable ailments to which human flesh is heir, those which bring shame or disgrace to the sufferer are inconsiderable. Of those so afflicted who consult physicians but an inconsequential proportion are restrained from complete disclosure by apprehension of enforced publicity of shameful secrets. When we realize that but an insignificant segment of society requires protection of this nature, well may we wonder whether the shield designed for their benefit should be made so broad and ample as to constitute an insuperable barrier to the attainment of justice by the heirs and representatives of those who do not need such protection.

Ordinarily bodily affliction and disease are attended with neither shame nor disgrace. The character of one's ailment is not usually a secret. It is generally known to one's neighbors, friends, and acquaintances. In all the range of human affliction one can think of but one class of diseases that he would hide from his friends and neighbors, and that is venereal diseases. No other diseases, nor class of diseases, bring humiliation or shame or disgrace to the

sufferer. He who has acquired venereal disease by clandestine liaison has scant claim upon legislative consideration for protection from the shame which he has deliberately invited. In the last analysis, therefore, this statute must be said to have been enacted to save from shame and disgrace those who by their own acts have forfeited their honor. If this could be done without at the same time working injustice to the innocent and the pure, the purpose might be generous and praiseworthy. But where the innocent are made to suffer to shield the wicked and the guilty from the publicity of their own misconduct, the cost of generous consideration becomes too great. Taking society as a whole, this statute cheats rather than promotes justice. It suppresses rather than reveals truth. This case furnishes a splendid illustration of its consequences. Here a poor widow is turned out of court, unable to recover on a contract made by her deceased husband for her benefit, because this statute closes the mouth of his attending physician. The same result must follow in any case for the recovery of damages for death caused by wrongful act, where the testimony of the attending physician is necessary to establish the causal relation between the injury and the death. The innocent should not be thus deprived of justice and made to pay the cost of the protection which this statute would afford to those who have forfeited all right to protection.

The centuries of experience during which the common law was developed did not give rise to this rule. As already stated, it had its origin in a statutory enactment of the state of New York, and not more than half of the jurisdictions of this country have been impressed with the wisdom or justice of the rule thus created. Well may this statute receive legislative reconsideration, and if it still be thought desirable to afford protection to those who have but scant claim upon the consideration of society, then let it be so

framed that such protection can be extended without working hardship and injustice to the innocent and the pure. While a statute so sweeping and unambiguous in its terms is difficult of administration by the courts so that injustice will not result, or of confinement to the accomplishment of the purposes for which all know it was designed, yet, nevertheless, courts have somewhat ameliorated its harsh results by the application of well-founded legal principles. It has been held that the statute confers a privilege upon the patient, and that he may release the seal placed upon the mouth of the physician by waiving the privilege. In order that harsh results might not follow, it has been held in many jurisdictions that the privilege could be waived by an heir or personal representative of the patient after he is dead. 4 Wigmore, Ev. § 2391 and cases cited, to which may be added *Olson v. Court of Honor,* 100 Minn. 317, 110 N. W. 374. This court, however, is firmly committed to the proposition that the privilege may be waived by no one except the patient himself, and that the power does not pass to his heirs or personal representatives. *Will of Hunt,* 122 Wis. 460, 100 N. W. 874; *Will of Bruendl,* 102 Wis. 45, 78 N. W. 169; *Casson v. Schoenfeld,* 166 Wis. 401, 166 N. W. 23. But it is also firmly established that the privilege may be waived by acts other than those amounting to an express waiver in open court. *McGinty v. Brotherhood of Railway Trainmen,* 166 Wis. 83, 164 N. W. 249. It is also well established that where a testator calls upon his attorney to witness his will he thereby releases the seal placed upon the lips of his attorney by force of the similar rule making confidential communications made by the client to his attorney, and the attorney becomes a competent witness to the execution of the will and to the competency of the testator to make a will. *McMaster v. Scriven,* 85 Wis. 162, 55 N. W. 149; *Will of Coleman,* 111 N. Y. 220, 19 N. E. 71; *Alberti v. N. Y., L. E. & W. R. Co.* 118 N. Y. 77, 85, 23 N. E. 35. These cases recognize the principle that,

although dead, the deceased may leave behind him evidence which indicates an express intention on his part to waive the privilege. In *Will of Coleman, supra,* it is said:

"It would be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action."

Just as these considerations have prompted courts to hold that, where a testator requested his attorney to witness his will, he thereby waived the privilege of secrecy attaching to his communications, so here it should be held, in my opinion, that the deceased, in applying for, taking out, and paying premiums upon this insurance policy, waived the privilege of secrecy which the statute imposes upon his attending physician.

It is matter of common knowledge that in order to recover upon a policy of this kind it must be proved that death was the result of an injury, and that in the vast majority of cases this causal relation can be proved only by the attending physician. It is to be presumed that when insured made application for the insurance policy and paid the premiums thereon as they became due he did it with the intention that his beneficiary would be able to secure the benefits provided by the terms of the policy. With that plain proposition every one will agree. Now to ascribe to him an intention to leave the provisions of this statute in force, thereby destroying the only evidence upon which his beneficiary may rely to establish liability under the policy which he has bought and paid for, is to make his transaction a most silly and foolish one. To my mind the waiver of the statute follows as logically in this case as it does when a testator calls upon his attorney to witness his will, and just as logically as it did in the *McGinty Case,* 166 Wis. 83, 164 N. W. 249. People pay for death-benefit provisions in in-

surance policies for but one purpose, *i. e.* so that their beneficiaries may recover thereon in case of death, and it is not their intention that such provisions shall be rendered nugatory, and their premium payments donations to the insurance companies, by withholding from the beneficiaries the only evidence upon which they may rely to collect upon the insurance policy when the insured has it within his power to release it.

I maintain, therefore, that by the very act of applying and paying for an insurance policy of this nature the insured thereby waives the privilege of the statute just as effectually as does the testator who calls upon his attorney to witness his will.

I agree that the statements made by the deceased to his physician concerning the nature of the bodily injuries cannot be received for the purpose of proving the fact of the accident. But in this case there was ample evidence from which the bodily injuries might be inferred without reliance upon statements made to the physician by the deceased.

For these reasons, therefore, I think the judgment should be reversed, and the cause remanded for a new trial.

I am authorized to state that Mr. Justice SIEBECKER concurs in the foregoing dissenting opinion.

A motion for a rehearing was denied, with $25 costs, on September 25, 1920.

ATTORNEY GENERAL EX REL. BECKER and others, Appellants, vs. BAY BOOM WILD RICE & FUR COMPANY and another, Respondents.

June 2—October 19, 1920.

Navigable waters: Floating bogs: Land submerged by construction of dam: Navigability for twenty years: Impairment by dikes and drainage systems: Riparian rights: Permit to erect dike issued by United States: Avulsion.

1. A "floating bog" is a mass of grass, reeds, and other aquatic vegetation growing and floating on the water, which may become frozen into the ice in winter, and in high water is carried on the surface and broken off and may be moved by winds and currents to deep water where it disappears as sediment; and its formation in the summer season indicates a substantial amount of water between it and the soil forming the bed of the water.
2. A meandered lake, in fact navigable for over twenty years by boats and small water-craft and resorted to by the public for fishing and hunting in boats except when prevented by ice in winter or low water in droughty summer seasons, is navigable water, and the public cannot be enjoined from hunting or fishing thereon; and it is immaterial whether the waters were originally navigable or were made so by artificial agencies.
3. Land which became submerged by a dam raising the waters of a lake became an extension of the lake, title to the land being in the state, and the public has the right to enjoy the easements of navigation.
4. "Avulsion" is a sudden disruption of a piece of ground from one man's land which is carried to another's and which may be followed and identified, as distinguished from that increment which slowly or rapidly results from floods but which is utterly beyond the power of identification, and particularly from "gradual and imperceptible accretion."
5. Where a considerable part of the expanse inclosed by a dike was navigable water for twenty years or more before such inclosure, neither the defendants nor their predecessors in title had a legal right to destroy or impair the public easement therein through the establishment or operation of a drainage system, under sub. (1), (2), sec. 30.01, Stats.
6. A riparian owner's rights to construct embankments are limited, and he may, where necessary to protect his banks

against navigable waters, at his peril both of obstructing the public use and as to the necessity, intrude only as far as necessary in such waters; and any other extension upon the bed of such waters is wrongful and vests no right or title in him to continue the same.

7. A federal permit to construct a dike expressly declaring that it granted no property rights or exclusive privileges and that the free public use of the area inclosed was not to be prevented, is construed, in the light of the conditions upon which it was granted, not to vest defendants with the right to continue a dike which encroached upon and injured the enjoyment of the public easements of navigation, fishing, and hunting.

Appeal from a judgment of the circuit court for Winnebago county: Geo. W. Burnell, Circuit Judge. *Reversed.*

This action was brought to prevent the construction and maintenance and to secure the removal of an earth embankment built within the water of Lake Poygan, a meandered body of water in Winnebago county, Wisconsin. The premises involved are situated in the angle formed by the junction of the so-called "Government Boom Cut" with the Wolf river in town 20 north, of range 14 east, and the particular inquiry relates to the five or six hundred acres partially inclosed by the embankment or dike constructed by the defendant corporation approximately upon the line designated in a permit issued for such purpose by the federal War Department upon the defendant's application before this action was brought.

The complaint alleges, in substance, that Lake Poygan is a meandered and navigable lake situated in Winnebago county, and that in the north section of the land here involved adjacent to the so-called cut-off is situated Boom Bay, which is an expansion of open water of about the width of one-half mile, and that immediately bordering upon this open water on the west and north is situated a marsh area containing six or seven hundred acres of land covered by water, in which wild rice and wild celery flourish, and that this area during the hunting season, at

the ordinary stages of water in the Wolf river and in this lake, is covered by water at a depth of from two to four feet and is navigable for fishing boats, skiffs, and canoes, and is part and parcel of the navigable waters of the state of Wisconsin; that the plaintiffs and others similarly situated have used this marsh for hunting and that it has been used in this way since the admission of the state to the Union and should continue to be so used; that commencing in April, 1916, and continuing up to the present time, the defendant has been engaged in constructing a large dike or embankment in the navigable waters of this lake; that defendant has contracted with *Martin Neumann* to construct this dike; and that the structure is a public nuisance and should be removed.

The answer admits that the lake is meandered and navigable and that the location has been used for many years by the public for hunting and fishing; denies inclosing navigable waters or excluding the public; alleges damage to defendant's lands by high water washing the same away; alleges the formation of a drainage district to inclose this area by the grantors of title to the defendant, for drainage, reclamation, and improvement; alleges that the dike is lawful, is within the original meander lines, is authorized by the drainage proceedings, is not a nuisance, and is lawful to protect, save, and reclaim its lands within the embankments

The case was tried before the court. Among the findings of the court were the following: That the defendant corporation uses these lands as a hunting preserve for ducks and for a farm or breeding place for fur-bearing animals; that these lands were granted to Wisconsin under the swamp land act of Congress and were conveyed by the state to the predecessors in title and grantors of the defendant corporation as "lands" and not "lake," and that they were *"lands" in fact,* although *"swamp lands;"* that when the United States government dam was built at Menasha it raised the level of the water in Lake Winnebago, in the Fox river,

and in Lake Poygan so that these lands were seriously injured by high water; that the injury to the lands became more serious after the illegal placing of flush-boards in this dam in the year 1900 and their maintenance there for some five or six years thereafter; that much of the marsh lands belonging to the defendant and its grantors and predecessors were from time to time torn away and lost; that in the way above mentioned most of the land between Wolf river, Bay Boom cut on the west and north, and Lake Poygan on the east and south, outside of the limits of the dike or embankment constructed by defendants, had been denuded of its surface soil to a large extent prior to 1905; that from 1900 to 1905 flush-boards on the dam at Menasha were illegally maintained; that these flush-boards raised the water in Lake Poygan approximately eight inches, causing great damage to the land now owned by the defendant corporation; that up to sixteen or eighteen years ago it was possible, in the ordinary stages of water, to walk all over defendant corporation's lands, which are now embraced within the confines of the dike, except only for two or three duck holes a few square rods in extent; that a boat could not be operated at this time on any parts of the lands now inclosed by the dike excepting the two or three small duck holes above mentioned; that the dike or embankment complained of is built wholly upon the lands of the defendant corporation, and that the water on either side of this dike in ordinary times now varies from a few inches in depth to within one or two feet at some points, and is not now and never was navigable in fact for anything except canoes and light-draft rowboats, and, so far as appears, was never navigated by any one except hunters and trappers.

The court further found that the grantors of the defendant corporation, Heuer and Sherman, procured a drainage district to be formed under the state laws for the purpose of authorizing the work of reclaiming and perfecting these lands; that they also obtained a permit from the

United States, through the secretary of war, for the erection and maintenance of the dike or embankment complained of; that the dike has been built in substantial compliance with the plans adopted by the drainage district and in substantial compliance with the permit from the United States; that the United States has never acquired or paid for any right to flow these lands, and no such right has ever been acquired by judgment or otherwise, unless by prescription as to that part of the lands outside of the present dike or embankment, which may have been overflowed for twenty years or more; that the dike was built in the years 1917–1919 for the purpose of preventing further destruction and tearing away and loss of lands of the defendant corporation within the space bounded by the Wolf river, the Bay Boom cut, and the dike, and to reclaim and restore any part thereof that had been washed away within the last twenty years, said carrying away having been caused mainly in the last sixteen or eighteen years by the illegal placing of flush-boards in the dam at Menasha from 1900 to 1905; that of the 600 acres of land or more inclosed within the limits of the dike and the Bay Boom cut and the Wolf river something more than one third and less than one half has been torn loose and washed away by the violence of the spring floods since the placing of these flush-boards; that the same has been torn away in large pieces, as much as twenty, forty, sixty, and eighty acres in one tract or piece; that the space formerly occupied by the land thus washed away is covered in high water by a few inches of water and on the surface thereof is floating bog, aquatic plants, weeds, and wild rice; that if the land remaining were not protected by the dike, it is reasonably certain that a large part thereof would soon be washed away and destroyed; that the dike is not a nuisance and does not interfere with or prevent the exercise and enjoyment of any rights or privileges of the relators or of the public; that the dike is a legal and lawful structure and that defendants have the right to construct and maintain the

same; that the construction and maintenance thereof is necessary for the protection and preservation of the lands of the defendant and for the reclaiming of that part of the lands which has been lost within the period of twenty years prior to the erection and construction of the dike.

As conclusions of law the court found that the land within the limits of the dike is the property of the defendant corporation; that defendant is entitled to have the dike constructed and to maintain the same for the protection of its lands and the reclamation of that part lost within the twenty years prior to the building of the dike; that the dike is a lawful structure and not a nuisance; that it does not interfere with the rights of the public nor affect navigation; and that the permit of the United States for the erection of the dike is valid in force and effect.

Judgment was entered dismissing relators' complaint on the merits, from which judgment this appeal is taken.

For the appellants there was a brief by *Thomas H. Gill* and *Arthur R. Barry,* both of Milwaukee, and oral argument by *Mr. Gill.*

For the respondents there was a brief by *Paul D. Durant* of Milwaukee and *Thompson, Gruenewald & Hull* of Oshkosh, and oral argument by *J. C. Thompson.*

The following opinion was filed July 17, 1920:

Siebecker, J. It is substantially conceded that the area of land in controversy lying within the bounds of the Wolf river on the west and north, the Boom cut-off on the north and east, and the dike involved in this action, embraces about 600 acres, and that defendant is in possession thereof; that it has been and now is used as trapping, fishing, and hunting grounds. The court found, among others, the following facts: (1) That the state conveyed this area as lands and that they were in fact swamp lands; (2) that they were injured by the rise of the water level in Lake Winne-

bago incident to the erection of the Menasha dam; (3) that large areas of the 600-acre tract have been injured by the increased high water caused by placing and keeping eight-inch flush-boards on the crest of this dam in the years from 1900 to 1905; (4) that such injury to the lands due to such placing of the flush-boards on this dam caused a loss of the surface of a large tract of this area by avulsion; (5) that none of this area was navigable by boats, skiffs, or other water-craft prior to the time the flush-boards were placed in the Menasha dam in 1900, and that the lands were denuded of their surface growth and soil and were thereafter partially covered by water on account of this illegal raising of the water at that time; and that much additional injury will be done to these lands unless protected by the dike in question.

These findings of fact are sharply challenged on this appeal upon the ground that there is no evidence in the record to sustain them. Did the court err in finding that none of the 600-acre area was navigable water before the flush-boards were placed on the crest of the Menasha dam in 1900? We are of the opinion that the court erred in not finding as a fact, upon the evidence adduced, that there were navigable waters within this area prior to the use of the flush-boards in 1900. It appears that this error of the trial court resulted from an erroneous conception of what have been repeatedly held to be navigable waters in this state for the purpose of boating and fishing, in mistaking what is in fact marsh ground as contradistinguished from floating bog, and as to what constitutes avulsion in the law of waters. It appears that the Menasha dam was constructed about 1850, that it raised the waters in the Wolf river and Lake Poygan bordering on the area of land in controversy, and that the waters so raised percolated into the surface soil of the greater part of this 600-acre tract. It is undisputed that the waters of the lake and river were annually maintained at a high stage during the spring

months, extending into June and at times into July; that it then fell below the height of the dam's crest in the dry months of summer, but commonly raised to its high level in the latter part of October and November, where it remained until covered with ice; and that it was lowered by being drained off during the winter to its lowest stage. The evidence is clear that when the water was at its high stages a large part of this area was navigable by boats and water-craft, and that at the highest stages of water in the spring of the year the whole area was covered by water to a depth that made it navigable for all ordinary boats and pleasure craft, and that it was in fact at times used for floating and storing logs therein for commercial purposes. The incontrovertible physical facts shown by the evidence are that the original parts of this marsh ground, after the construction of the dam, became covered with wild rice and other aquatic vegetation during the period from 1851 to 1885 and that the areas so affected covered a large part of the lands in controversy. In this connection it is appropriate to state that these physical facts and conditions refute the statements of some of defendants' witnesses to the effect that the whole area inclosed by the dike was marsh land of the nature and kind it had been originally, as late as 1900 and thereafter. The evidence also clearly shows that much of this area so changed from its natural state was covered by floating bogs. Some of the witnesses evidently erroneously believed that the vegetation in such bogs was a growth of grass and reeds from the soil soaked with water, and they were thereby led to the erroneous opinion that the area so covered by such bogs was not flooded by water. In fact, however, floating bog is a mass of grass, reeds, and other aquatic vegetation which grows and floats on the surface of water in warm weather, which may become frozen into the ice during the winter, and upon the recurrence of high stages of water is carried on its surface, is broken off, and may be moved by the winds and currents to deep

waters, where it is ground to shreds and disappears as sediment on the bed of the water. When it so floats and before it is so destroyed and deposited on the water bed, it is in no sense soil or land. Wherever it forms in the summer season it indicates that there is a substantial amount of water between it and the soil forming the bed of the water. All of the witnesses familiar with the conditions prior to 1900 and reaching as far back as 1875 admit that the area inclosed by the dike had upon it large quantities of floating bog. During the summer seasons these bogs rested on the dry soil until they were again raised by the higher stages of the water during the wet seasons. These physical conditions show that the areas over which these bogs spread were covered by water and that the original soil and marsh grass growing thereon had been gradually changed from dry land to water basins, interspersed with mud and bogs, and having small openings of clear water in dry seasons where ducks and fish abounded among a luxuriant growth of wild rice and other aquatic vegetation. These facts are significantly brought out in the testimony of all witnesses except those who testified to walking all over the area at times, that they observed only a few small water holes, and noted that marsh grass grew there in its natural state. All of such testimony is readily explicable as showing that these witnesses testified to conditions that existed either in dry seasons or that their observations were limited to high ridges of land or that they in fact saw only a small portion of the area inclosed by the dike. It is clear that the overwhelming weight of the evidence establishes the facts that large expanses of this area in ordinary stages of water were in fact navigable by boats, skiffs, and small water-craft at a time long prior to 1900, when the flush-boards were placed on the dam at Menasha, and that the public resorted to these for hunting and fishing in boats and skiffs, except when prevented by the ice in winter and for very limited times in droughty summer seasons. From these facts and

conditions it necessarily follows that considerable portions of the area inclosed by the dike, Wolf river, and Boom cut-off were navigable in fact for a period exceeding twenty years before the commencement of this action and that the circuit court's findings to the contrary have no evidentiary support. It has repeatedly been recognized and held by this court that bodies of water like this one, existing under the conditions referred to above, constitute navigable waters and are subject to the public easement of boating for pleasure as well as profit, and the public cannot be enjoined from hunting and fishing thereon. It matters not whether such waters were originally navigable or were made so through artificial agencies if they in fact existed for a sufficient length of time as navigable bodies of water. In *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661, it is declared that a body of water, much of which disappeared in summer, leaving a considerable expanse of water interspersed with mud, marsh, and bogs, with openings of clear water among a luxuriant growth of rushes and wild rice, but which was navigable *in the ordinary stages of water only* by small craft like canoes or hunting skiffs propelled by paddles, is a lake, and title to the lands under it is in the state and the rights of riparian owners stop at the water line. Although the body of water there in controversy was a meandered lake, the holding is illustrative of what conditions make a body of water a navigable one and subject it to the easement of hunting and fishing.

In *Olson v. Merrill,* 42 Wis. 203, it was declared that navigability of a stream does not require it to be so continuously throughout all seasons of the year. "If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement."

In *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273, an unmeandered stream, "capable in times of high water of floating logs and small rowboats, although at other times rowboats cannot be taken up the stream without dragging or pushing them on the bottom in numerous shallow places," is held to be a navigable stream and subject to the public easement. See, also, *Diana Shooting Club v. Husting,* 156 Wis. 261, 145 N. W. 816; *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12.

It is undisputably established that the land in the area in question became submerged by the raising of the water by the Menasha dam and that the waters thereon are an extension of Poygan lake, and hence the title to the submerged land under the navigable waters is in the state, and the rights of the public to enjoy this easement are correspondingly extended to embrace all the navigable waters within it. *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Diana Shooting Club v. Husting,* 156 Wis. 261, 145 N. W. 816; *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12.

The court found that the raising of the water by the flush-boards on the Menasha dam caused the loss of large tracts from this area by avulsion. We find no evidence in the record to sustain this finding. What is avulsion?

"The terms 'avulsion' on the one hand, and 'gradual and imperceptible accretion,' on the other, are used by writers on alluvion to contradistinguish a sudden disruption of a piece of ground from one man's land to another's, *which may be followed and identified,* from that increment which slowly or rapidly results from floods, but which is utterly beyond the power of identification." *Benson v. Morrow,* 61 Mo. 345.

"The removal of a considerable quantity of soil from the land of one man and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water." Bouvier, Law Dict. See, also, cases in 6 Corp. Jur. 876, notes 62 and 63.

As above indicated, the evidence shows that the bog referred to by witnesses was floating bog, and that a considerable expanse of the area in question was covered by floating bog prior to the time the flush-boards were placed on the dam in 1900. It is manifest that when witnesses speak of having observed large areas of grass and soil fastened together by the ice moved by the action of high water in the spring season after 1900, they did in fact see floating bog being carried away. But it is said the witnesses describe this process as the carrying away of grass and soil. The infirmity of this class of testimony is that the witnesses state as fact what is in reality an opinion. Their testimony shows that they had no opportunity to know the actual constituents of what disappeared except by seeing it float. The fact that it floated negatives their inferences that it was soil; furthermore, it is common knowledge that a cover of ice embedded in ordinary marsh grass, when suddenly raised by water, cannot bodily carry away the soil and roots of grass and wholly denude the bed it rested on and carry it as a float on the rising tide of water. Such removals indicate that the action of water has imperceptibly undermined the growing surface and produced what is known as bog, which has become separated from the bed of the waters. This is a slow, imperceptible process which has no relation or analogy to avulsion. It is also undisputed that the alleged carrying away of the surface out of this area was characterized by a slow process of disintegration and dissipation, and that it disappeared no one knows where. This rendered it wholly impossible *to follow and identify the masses so carried away and locate them on another's land,* which are essential elements of avulsion. It is obvious that the evidence wholly fails to show that there was any loss of lands from the inclosed area by avulsion.

It being established that a considerable part of the expanse within the area of the dike was navigable water twenty years and more before this area was so attempted

to be inclosed, it follows that neither the defendants nor any of their predecessors in title to the lands had a legal right to destroy or impair the easement thus acquired by the public and that they had no authority to destroy or injuriously impair such right through the establishment and operation of a drainage system under the statutes. Sub. (1), (2), sec. 30.01; *In re Dancy D. Dist.* 129 Wis. 129, 108 N. W. 202; *Merwin v. Houghton,* 146 Wis. 398, 131 N. W. 838; *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12.

It necessarily follows that defendants acquired no rights under the establishment of the drainage district covering this area to impair or injuriously affect the public easement of navigation and of hunting and fishing.

It is the settled law of this state that riparian owners cannot encroach on the public rights to such waters. It was held in an early day that the riparian owner's rights to construct embankments are limited, and that he may in case of necessity, where the navigable water is moving away or intruding upon his bank, as against the public, *at his peril of obstructing the public use and at his peril of the necessity,* "intrude, as far as may be necessary, into the water, for the construction of works necessary to the protection of his land against the action of the water." *Diedrich v. N. W. U. R. Co.* 42 Wis. 248. Any other extension by the riparian owner into the water and encroachment upon the soil forming the bed of the navigable water is wrongful and vests no right or title in him to continue the same.

Under the facts shown it is manifest that the defendant cannot construct the dike upon the bed of navigable water. It is also clear that the principal object and purpose of placing the dike as located by the federal permit was to protect the inclosed area from being used by the public for pleasure boating, hunting, and fishing. It is shown that the dike is a serious encroachment on the public easement in that it tends to obstruct the free navigation of the waters and interfere with the public uses of hunting and fishing on

the inclosed waters. If the defendants' claim that the dike serves to restore the original condition that existed before the lands became submerged by the waters is well founded, then clearly it cannot be maintained, because it would destroy the public easement of navigation and the rights of fishing and hunting. The federal permit expressly declares that it grants no property rights or exclusive privileges and that the free use by the public of the area inclosed is not to be prevented. The application for the permit and the grant of it presupposes that there was a body of navigable water; otherwise it was an idle ceremony. It is considered that the facts show that the construction of the dike was not sought by defendant for the improvement of navigation and that its location and construction is in fact an injury to the public easement and that the federal permit, in the light of the conditions upon which it was granted, does not vest defendant with the right to continue the dike, since it is an encroachment and injury to the enjoyment of the public easements of navigation and the rights of fishing and hunting.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to award judgment as prayed for in the complaint, enjoining defendant or any one under it from constructing or continuing the dike as contemplated by defendant, and that defendant abate it so as not to encroach upon and interfere with the free use of the public easement to navigable water inclosed thereby.

Owen, J., took no part.

A motion for a rehearing was denied, with $25 costs, on October 19, 1920.

RAMSTROM, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

June 4—October 19, 1920.

Railroads: Brakeman boarding moving train: Assumption of risk.

The head brakeman of a freight train who was late for his train and attempted to board it at a place other than the starting point and when it was running at a speed of ten to twelve miles an hour, assumed the risk of injury by being thrown under the car, although the conductor told him to hurry and get on the train.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Personal injury. The plaintiff was a brakeman in the employ of the defendant company. For a period of four and one-half months or more he had served as such on the freight run between La Crosse and Minneapolis. Not finding his run scheduled as to time but by order of departure of trains, he took a long walk through the city of La Crosse and North La Crosse, and about 4:15 looked at the bulletin board and saw that his train was scheduled to leave at 4:15. He asked one of the officials if the conductor had a brakeman in his place, it having been his duty to remain at his boarding house or let it be known where he could be found, and was advised that he probably had not. At about that time the train came in sight, the plaintiff ran to the Allen House, a distance of 248 feet, and back to a telegraph pole, a distance of 140 feet more, while the train was going at what appeared to one witness to be about an equal distance. At the Allen House the plaintiff secured his coat, which he carried under his arm, and passed across the tracks in front of the engine. The operator was on the station platform and gave the plaintiff the orders of clearance and the bridge card. The plaintiff handed one of the cards to the fireman and the other to the conductor, who had dropped off the train as it approached. The conductor gave the plaintiff

some instructions about cars which were to be set out, and said to the plaintiff, "You better hurry up and get her; you won't have so many to walk over." It was the duty of the plaintiff to have taken his train in the east yard, where it was made up, but because he had not left word where he could be found he decided to take the train at North La Crosse as it was passing through. He then attempted to board the moving train. He testified that he made a swing for it; that he got hold of the rung with both hands; that in some way he was jerked under, and he knew nothing further until he had received the injury complained of. The speed of the train was variously estimated from ten to fifteen miles an hour. The witness who testified that it was moving at the rate of fifteen miles per hour had a very poor opportunity to judge of its speed, but the plaintiff's own opinion was that it was traveling from ten to twelve miles an hour.

The case was tried with a jury, the issues being submitted to it in the form of a special verdict. The jury found (1) that the train at the time of the accident was running at greater speed than that at which brakemen customarily board moving trains in the performance of their duties as brakemen; (2) that the conductor of the defendant in charge of the train was wanting in the exercise of ordinary care in telling the plaintiff to board the train immediately prior to the time of the accident; (3) that such want of care on the part of the conductor was a proximate cause of the plaintiff's injury; (4) that the engineer of the train was wanting in the exercise of ordinary care in running the train at a greater speed than was customary; (5) that such want of ordinary care on the part of the engineer was a proximate cause of plaintiff's injury; (6) that a person of ordinary intelligence, with the experience of plaintiff, in the exercise of ordinary care ought not to have appreciated the danger incident to the boarding of the moving train at the time of the accident; (7) that the plaintiff was wanting in the exercise of ordinary care which contrib-

uted to his injury; (8) that the ratio of the negligence of the plaintiff as compared to that of the defendant was as two to one in favor of the plaintiff; (9) that the injury was not the result of pure accident; and assessed the damages at $7,000. Upon motion after verdict the trial court ordered that the answers to questions 1, 2, and 4 be changed from Yes to No, and the answer to question 6 be changed from No to Yes. The defendant had judgment upon the verdict as amended, dismissing the action with costs, from which judgment the plaintiff appeals.

For the appellant there were briefs by *F. E. Withrow*, attorney, and *Winter, Morris, Esch & Holmes*, of counsel, all of La Crosse; and the cause was argued orally by *Mr. Withrow* and *Mr. Frank Winter*.

H. J. Killilea and *Paul W. Mahoney*, both of Milwaukee, for the respondent.

The following opinion was filed June 23, 1920:

ROSENBERRY, J. The plaintiff contends upon this appeal that the court erred in setting aside the answers as indicated in the special verdict and in holding that the plaintiff assumed the risk incident to his employment. In passing upon the motions after judgment the trial court said:

"The plaintiff in this case testified that mounting cars in motion was a part of his duties as a brakeman; that he had been in the habit of doing so on every day that he had worked for the defendant during the term of his employment, which covered a period of nearly five months. His testimony shows that he was instructed in respect to his duties and the dangers of the employment; that he was familiar with the rules and regulations; that he is a man of at least ordinary intelligence, and it is apparent that the danger was open and obvious and as completely within his knowledge as that of the master or its representatives, and he himself says, and he reiterated the statement, that he simply miscalculated the speed of the train. Under these

circumstances it is clear that he assumed the risk unless it can be said that the risk was one which was created by the negligence of a fellow-servant and not one incident wholly to the employment."

The court in effect found that there was no evidence to sustain the finding of the jury to the effect that the defendant company was guilty of negligence. We shall not attempt to set out the evidence in detail. We have carefully examined it, and are of the opinion that the trial court's conclusion should be upheld. This action was brought under the federal employers' liability act (35 U. S. Stats. at Large, 65, ch. 149), and the rights of the parties must be determined in accordance therewith and with the decisions of the United States supreme court construing that act.

Plaintiff bases his contention that the trial court was in error in holding that the plaintiff assumed the risk upon *Chesapeake & O. R. Co. v. De Atley,* 241 U. S. 310, 36 Sup. Ct. 564. In that case it was held that an employee might presume that a co-employee would exercise due care for his safety, and does not assume the risk attributable to the operation of a train at an unduly high speed until made aware of the danger, unless the undue speed and consequent danger are so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger. The difficulty with plaintiff's contention is that under the facts of this case the plaintiff did know and appreciate the fact that the train was operating at a high speed and was fully aware of all the hazards of attempting to get upon it as it was then traveling. This case is ruled by *Boldt v. Pennsylvania R. Co.* 245 U. S. 441, 38 Sup. Ct. 139, where it was held that under the employers' liability act a servant assumes extraordinary risk incident to his employment or risks caused by the master's negligence which are obvious and fully known and appreciated by him, as he did at common law.

As the trial court said, "When a defect is so obvious or so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence, and experience, and the danger and risk from it are apparent, he cannot be heard to say that he did not realize or appreciate them." In this case the plaintiff had seen the train approaching for more than two blocks. He ran a race with it in order to procure his coat. He ran across the street just in front of it, and testified that it was coming so fast that he barely made it, and then with full knowledge of all the facts and circumstances he attempted to mount the train. He was a man of mature years, and he was fully cognizant of the danger attendant upon his act. We think the trial court correctly held that he assumed the risk. *Seaboard A. L. Ry. v. Horton,* 233 U. S. 492, 34 Sup. Ct. 635; *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on October 19, 1920.

STATE EX REL. HOWE, Respondent, vs. LEE, County Clerk, Appellant.

June 5—October 19, 1920.

Taxation: Certiorari to review assessment of income-tax board: Measure of profits on sale of corporate stock: Dividend stock: Basis for determining profits: Evidence: Appraisals: Property received in exchange.

1. Upon *certiorari* to review the assessment of an income tax the presumption is that the decision of the board of review is correct; and if upon any reasonable view of the evidence it will support the decision it cannot be disturbed, for the weight or credibility of the evidence cannot be reviewed.
2. The excess of the selling price of corporate stock over its value January 1, 1911, would measure the profit subject to an income tax to the corporation, or to the stockholders thereof

where the corporation paid no income tax thereon; and relator, a stockholder, would be required to pay such proportion of the total tax as his shares bear to the total shares.

3. Where the market value of corporate assets on January 1, 1911, was the par value of its stock, and additional stock issued by the company was dividend stock, issued out of profits, going to swell the value of its corporate assets, of which the stockholder relator received his due share, this, together with his other stock, represented his proportionate share of the corporate assets for the purpose of estimating income tax.
4. The actual and not the book value of corporate stock governs for income-tax purposes, and the amount of the corporate debt, if any, should be added to the market value of the stock to ascertain the value of corporate assets; and in the absence of debt the market value of the stock measures the value of the corporate assets, or at least is competent evidence thereof.
5. In a proceeding to assess income tax of a corporate stockholder, the fact that such holder on a sworn appraisal fixed the value at eighty per cent. in 1909 and that another stockholder had appraised stock in the estate of a director of the corporation at par in 1911, in the absence of corporate debt is *held* admissible evidence to show that the stock was of par value on January 1, 1911.
6. In case of a sale of corporate stock partly for cash and partly for other corporate stock, if the property exchanged is valued at a price substantially corresponding to its market value, such price will govern in fixing the stockholder's income-tax assessment, where there is no contrary evidence of value.
7. Where a stockholder paid no more than par for any of his stock, the fact that he bought some after January 1, 1911, when the stock was at par, is immaterial, because its increase from the time of purchase to the time of sale would be measured by the excess of the sale price over par in fixing his income-tax assessment.
8. In determining the income from profits on sale of corporate assets, the fact that stock dividends represented shares in the company sold is immaterial where the par value of such shares was deducted and the income tax on only the excess sale price was imposed, no income tax thereon having been paid either by the corporation or the relator stockholder.

Appeal from a judgment of the circuit court for Rock county: George Grimm, Circuit Judge. *Reversed.*

Certiorari to review relator's income assessment for the year 1918 made by the Rock county board of review of in-

come taxes and approved on appeal by the tax commission. The relator returned his income for 1918 and the assessor added thereto the sum of $242,249, claimed to be profits made by the relator resulting from a sale to the General Motors Corporation about July 1, 1918, of the corporate assets of the Janesville Machine Company, of which relator was a stockholder. The assessor and the board of review found the value of the corporate assets of the Janesville Machine Company on January 1, 1911, to be equal to the par value of its stock. They were sold for 300 per cent. less a small sale charge of three and one-third per cent.

The circuit court reversed the assessment and sent the case back for a reassessment because it appeared that the relator received part cash and part preferred stock in the General Motors Corporation for his share of the corporate assets and that the value of the preferred stock could not be assessed as income until it was turned into cash, and for other reasons not necessary to state. The defendant appealed from an order denying the motion to quash the writ, and from the judgment, and the relator, pursuant to sec. 3049*a*, Stats. 1919, served notice to review the judgment, which directs how the reassessment should be made, claiming that he is not subject to the increased tax.

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *S. G. Dunwiddie,* district attorney of Rock county, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, and oral argument by *Otto A. Oestreich.*

The following opinions were filed July 3, 1920:

VINJE, J. Since the oral argument occurred defendant has filed with the clerk a written notice that he waives his appeal from the order denying his motion to quash the writ and asks that the case be considered upon the merits.

So considered the question is: Was there any competent, credible evidence to sustain the finding of the board of review that the value of the corporate assets of the Janesville Machine Company on January 1, 1911, when the income tax law went into effect, was equal to the par value of its stock?

Upon *certiorari* the presumption is that the decision of the board of review is correct, and if upon any reasonable view of the evidence it will support such decision it cannot be disturbed, for the weight or credibility of the evidence cannot be reviewed. *State ex rel. Spritka v. Parsons,* 153 Wis. 20, 139 N. W. 825; *State ex rel. Althen v. Klein,* 157 Wis. 308 (147 N. W. 373), and cases cited on p. 312.

It is a verity that the corporate assets sold for $1,000,000 cash and $1,250,000 in preferred stock of the General Motors Corporation in July, 1918. The excess of selling price, if any, over their value January 1, 1911, would measure the profit subject to an income tax to the corporation, or to the stockholders thereof if the corporation paid no income tax thereon, which it is conceded it did not in this case. The relator would be required to pay such proportion of the total tax as his shares bear to the total shares of stock. The authorized capital stock of the Janesville Machine Company on January 1, 1911, was $500,000. In August, 1915, this was increased to $750,000. By a contract entered into between the stockholders and the General Motors Corporation in May, 1918, it was agreed that a new corporation known as the "Janesville Machine Company" should be formed, having a capital of $1,000,000 common stock and $1,250,000 preferred stock; that the new company should buy or absorb the old, and that the General Motors Corporation should buy or absorb the new company, paying therefor $1,000,000 in cash and $1,250,000 in its own preferred stock at par. This was done. The old company was dissolved. At any rate the result of the transaction was that the General Motors Corporation received

all the corporate assets of the Janesville Machine Company, paying therefor 300 per cent. of its par value less three and one-third per cent. expense for the sale, and that the Janesville Machine Company was dissolved and ceased to exist. The difference between the par value of relator's shares and what he received for them in cash and preferred stock at par, less expenses of sale, was $242,299, which was the amount added to his income tax return. If the value of the corporate assets of the Janesville Machine Company on January 1, 1911, was equal to the par value of its shares of stock, then the action of the board was correct, for it appears that all additional stock issued by the company since that date was dividend stock issued out of profits and going to swell the value of its corporate assets. Of such dividend stock the relator received his due share, and it together with his other stock represented his proportionate share in the corporate assets.

There is testimony on the part of the relator to the effect that by reason of an undervaluation of the plant of the Janesville Machine Company, of its patents, good will, etc., the true value of the corporate assets was not shown by its book value, and that its true value was as great in 1911 as it was when sold in 1918 and was equal to the price it sold for. Hence there was no profit. Of course the actual and not the book value governs for taxing purposes. *Doyle v. Mitchell Bros. Co.* 247 U. S. 179, 38 Sup. Ct. 467, 62 Lawy. Ed. 1054. On the other hand, there was undisputed evidence that the stock of the Janesville Machine Company had never sold above par; that the relator, who was then president of the Janesville Machine Company, on December 2, 1909, acting as an appraiser in an estate of a stockholder, swore it was worth only eighty per cent. In October, 1911, in another estate, a director and stockholder appraised the value of the stock at par, and testified that there probably was no difference between the value of the stock in October, 1911, and January 1, 1911. Such evidence was competent

upon the question of the value of the corporate assets, and from it the assessor and board of review could find that the par value of the stock represented the par value of the corporate assets. It is not shown that the Janesville Machine Company was indebted at this time. Had it been, the amount of the debt would have to be added to the market value of the stock to ascertain the value of the corporate assets. In the absence of a debt the market value of the stock measures the value of the corporate assets—at least it is competent evidence thereof. Being competent evidence of their value, the finding of the assessor and board of review cannot be successfully challenged on *certiorari. State ex rel. Althen v. Klein,* 157 Wis. 308, 147 N. W. 373.

In the case of the sale of the property, the fact that other property is taken in part payment does not change the rule as to profits subject to an income tax. If the property taken in exchange is valued at a price that substantially corresponds to its market value, such agreed price will govern. If it be not valued, then its market value will control. Here there is no evidence to show that General Motors Corporation preferred stock was worth less than par, and for the purpose of income taxation it will, in the absence of other evidence, be deemed worth par. Hence the sale for taxing purposes is equivalent to a cash sale.

At the time of the sale the relator held 1,239 shares of stock. The evidence shows they had cost him par or less. They were valued at par as of January 1, 1911. Since he paid no more than par for any of his stock, the fact that he bought some after January 1, 1911, is immaterial, because its increase in value from the time of purchase to the time of sale would be measured by the excess of the sale price over par. For his share of the corporate assets he received $162,699 in cash and $206,500 in preferred stock, in all $369,199. Subtracting $123,900, the par value of his stock as of January 1, 1911, leaves $245,299. His assessment was

increased only $242,299; presumably the other $3,000 was his share of the expenses of the sale.

The case presents no question of taxing stock dividends. The corporate assets of the Janesville Machine Company were sold to the General Motors Corporation for a fixed sum. The fact that stock dividends represented shares in the company sold is immaterial. The par value of such shares was deducted and an income tax on only the excess sale price was imposed. Such excess sale price had never paid an income tax, either by the corporation or the relator. As stated by counsel for the relator on the oral argument, the only question on the merits of the case is, How much more, if any, were the corporate assets of the Janesville Machine Company sold for in 1918 than they were worth on January 1, 1911? The assessor and board of review found they were sold for $242,299 more than their value on January 1, 1911, and for reasons already stated such finding cannot be disturbed on *certiorari*.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the action of the assessor and board of review.

ROSENBERRY, J. (*concurring*). I concur in the result in this case for the following reasons: The entire corporate assets of the Janesville Machine Company were sold to the General Motors Company for a fixed sum. From the sale price was deducted the value of its capital assets. The difference represents the profit derived by the company from the sale. In the manner and by the means described in the statement of facts, the assets of the Janesville Machine Company were distributed to its stockholders, including capital assets and profit in the hands of the company. The corporation paid no income tax upon its profits thus distributed, and they are therefore subject to taxation in the hands of the stockholders, being in effect a distribution of profits, and therefore a dividend and taxable as

such under the doctrine laid down in *Van Dyke v. Milwaukee,* 159 Wis. 460, 150 N. W. 509.

The following opinion was filed October 19, 1920:

Per Curiam. A reading of the brief of relator on a motion to change the mandate from an affirmance of the assessment to one requiring a reassessment convinces us that the mandate as entered was probably erroneous because the facts necessary to determine the true tax due on the basis determined by this court were probably not all shown on the hearing. If so, it was not the fault of the relator, and he should therefore be given an opportunity to show the true facts as he claims they exist. For such purpose neither party is concluded by the evidence already introduced. Both may produce such further evidence as they may be advised.

The mandate is modified to read: Judgment reversed, and cause remanded for a reassessment of the tax upon the basis indicated in the opinion.

Klukas, Appellant, vs. Linderman, Administrator, Respondent.

September 21—October 19, 1920.

Executors and administrators: Claims against decedents: Amendment on appeal to circuit court: Appeal to supreme court: Weight accorded findings of court.

1. Although the original claim filed against the estate of a decedent in the county court alleged that a loan made to the deceased was evidenced by a writing, the action of the circuit court, after appeal, in allowing claimant to amend the claim by alleging the facts as to the loan in the form of a separate count without reference to the writing, was not improper, as such amendment did not withdraw the claim first filed, but merely allowed plaintiff to recover on the loan if legally established by other evidence in case he failed to establish that the writing was given by decedent.

2. Where the trial court saw the witnesses and heard their testimony, which was conflicting, it was the best judge of the weight thereof; and it is *held* that a finding that the deceased was not indebted to claimant at the time of his death is not against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

This plaintiff filed a claim in the county court of Dunn county against the estate of J. D. Simons, deceased, for the sum of $500, less interest payment of $25, which plaintiff claims he loaned to deceased on September 2, 1915. This claim as filed states that it was evidenced as follows:

Colfax, Wis., Sept. 2, 1915.

In the State of Wisconsin, in the County of Dunn. I herewith agree to pay *Mr. Robert Klukas* five hundred dollars with interest at five per cent. until it is paid.

J. D. SIMONS.

Interest as shown to this date	$70 83
Less one payment of	25 00
Leaving	$45 83
Total	$545 83

After a trial the county court allowed the claim in full, with interest. An appeal from this judgment was taken to the circuit court for Dunn county. In circuit court the claimant was allowed to add to his claim by alleging in substance a loan of $500, regardless of the paper or note evidencing it. The action was tried before the court without a jury. The court found (1) that the promissory note introduced in evidence was not executed by deceased and that the signature thereon is not the genuine signature of the deceased, and that deceased in no manner authorized the execution of the note; (2) that the allegations of the claimant that on September 2, 1915, he loaned to deceased the sum of $500 are unproven and untrue; (3) that at the time of his death deceased was in no way indebted to claimant. Judgment was entered disallowing the claim of plaintiff, from which judgment appeal is taken to this court.

For the appellant there was a brief signed by *Dayton E. Cook* of Chippewa Falls, and oral argument by *Mr. Cook.*

For the respondent there was a brief by *Linderman & Ramsdell* of Eau Claire, and oral argument by *G. O. Linderman.*

Siebecker, C. J. The original claim filed in county court by plaintiff states that the alleged loan was evidenced by the writing above mentioned. The circuit court permitted claimant to amend the claim by alleging the facts of the loan in the form of a separate count without reference to this writing. We discover no error in so amending the claim. This, however, did not operate to so amend the claim as to effect a withdrawal of the claim filed and thus completely substitute another claim for the one originally filed in county court. If plaintiff failed to establish that the writing as alleged was given by decedent as evidencing the loan, he would not be barred from recovering on his claim the amount of a loan if it was legally established by other evidence than the writing. Hence the amendment of the claim in circuit court accomplished no more than to permit claimant to recover the alleged debt, if satisfactorily proven aside from the alleged written memorandum. All of the evidence received by the court was material and competent evidence upon the issue raised by the pleadings, and must be considered in determining whether or not the findings of the circuit court assailed on this appeal are sustained. An examination of the evidence adduced shows that the circuit court was amply justified in concluding that the writing presented by claimant as evidencing the loan did not bear the signature of decedent and that the evidence of the witnesses testifying to the negotiation between claimant and decedent resulting in the alleged loan and the giving of the alleged writing, in connection with the other evidence before the court, lacked in probative force to establish the making of the loan as claimant asserts. The trial court saw

and heard these witnesses while on the stand and could best judge of the weight of their testimony. It is considered that the findings of the court cannot be held to be against the clear preponderance of the evidence, and they must stand.

By the Court.—The judgment appealed from is affirmed.

HADDOW, Respondent, vs. J. L. OWENS COMPANY, Appellant.

September 21—October 19, 1920.

Accord and satisfaction: Acceptance on account: Tender of less than sum due.

1. Where plaintiff, claiming $126.20 for services rendered by him as attorney, received from defendant a letter offering $40 as payment in full, but the check was not inclosed, and when he did receive the check he wrote that if defendant insisted it was in full he would return it, otherwise he would apply it on account, there was no accord and satisfaction.
2. There being evidence to support the finding of the trial court that the services were rendered at the request of the defendant, and the services admittedly done by authority being worth the sum asked, an offer of less than the amount due is not good as a tender.

APPEAL from a judgment of the circuit court for Pierce county: JAMES O'NEILL, Judge. *Affirmed.*

Action to recover compensation for an attorney's services. The case was tried to the court, and it made findings setting out in brief the services rendered and finding that they were worth the sum demanded by plaintiff, to wit, the sum of $126.20; that only $40 had been paid, leaving a balance of $86.20 due for services and $7.77 admitted due for disbursements. From a judgment entered accordingly the defendant appealed.

For the appellant there were briefs by *N. O. Varnum* of Hudson and *Francis B. Hart* of Minneapolis, and oral argument by *Mr. Hart.*

F. M. White of River Falls, for the respondent.

VINJE, J. The defendant makes three contentions: (1) that most of the services found by the court to have been rendered were not rendered at the request or by the consent of defendant; (2) that, if so rendered, plaintiff agreed to accept $40 in full; (3) that it made a valid tender of the amount due.

The trial court found that plaintiff was retained by the attorney of the defendant to assist in a case brought by defendant against one Whitcomb in Wisconsin involving a breach of warranty of a machine; that plaintiff assisted in drawing the jury. He served and procured to be served the necessary papers for bringing the case to trial; counseled and advised defendant; prepared and caused to be served and settled a bill of exceptions on appeal to this court; advised defendant as to the practice in this state; prepared and caused to be served and filed the necessary papers for the procuring, entering, and docketing of the judgment; wrote a large number of letters to the defendant's attorney in St. Paul about the case; and did other services therein. The court also found that such services were rendered at the request and with the consent of defendant. There is evidence to sustain both findings. It appears that defendant's president was present when the case against Whitcomb was tried; that he advised with plaintiff, and, indeed, it is not till plaintiff refused to accept $40 in full that we find any claim in the correspondence that some of the services were not authorized. In our view of the case, while we think the evidence sustains the finding that they were all authorized, still were it otherwise the judgment ought not to be disturbed because the services admittedly done by authority are worth the sum asked.

The claim that there has been an accord and satisfaction for $40 cannot be sustained. Plaintiff did not receive a check for $40 in the letter offering that sum in full, and when he did receive it he wrote defendant that if it insisted it was in full he would return it, otherwise apply it on account.

Under the findings of the trial court as now sustained no serious question of a valid tender arises. Defendant tendered $7.77 for disbursements and claimed that this, with the $40 paid, constituted a valid tender. It did not cover the amount due by $86.20 and so is not good as a tender.

By the Court.—Judgment affirmed.

HEIST, Administrator, Respondent, vs. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, Appellant.

September 21—October 19, 1920.

Workmen's compensation: Relation of master and servant: Action for death.

Where the electric lights of a village failed, and the superintendent of the company furnishing power instructed his wife by telephone to have some one repair the trouble and suggested she procure one L., a former employee of the company, it is *held* that the direction to procure L. was advisory only, and one H., whom the wife engaged, became an employee of the company and under the workmen's compensation act, so that his administrator could not recover in an action at law for death which occurred while he was engaged in repairing a broken transmission wire.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

This action was brought by the administrator of Erwin Heist, deceased, to recover damages, for the benefit of his father and mother, resulting from his death, which was occasioned by his coming in contact with one of the electric wires of defendant's power line. Upon the verdict of the jury judgment was rendered in favor of plaintiff, from which the defendant brings this appeal.

G. O. Linderman of Eau Claire and *Spencer Haven* of Hudson, for the appellant.

For the respondent the cause was submitted on the brief of *Geo. A. Lewis* of Minneapolis, attorney, and *C. J. Strang* of Grantsburg, of counsel.

Owen, J. The pivotal question is whether the deceased at the time of his death was an employee of the defendant company. The defendant is a power company with its principal plant for the generation of electric power located at the city of Glenwood. It furnished power for electric lights in the village of Boyceville. On the evening of August 23, 1918, the electric lights in the village of Boyceville were out. It was discovered that the wire carrying the current from Glenwood to Boyceville was broken. One Hill was the superintendent of the company and had general management of its affairs at Glenwood. On the evening in question he was at Stillwater. During a telephone conversation with his wife, at about 8 o'clock she advised him that there was trouble with the lights at Boyceville. He asked her if she could get hold of Norman Larson, who had been a former employee of the company, to go down. She said that he was out threshing. He asked her what had been done and she said they took out the fuse and transformer. She did not know at that time that the line was down. He wanted her to get Larson or somebody to get that line fixed, the fuse and transformer, so that they would have lights at Boyceville. He testified:

"When I called her up she said something about there having been trouble on the Boyceville line, and that was when I spoke about Norman Larson, and she said that the transformer had already been fixed by Mr. Northrup, she thought, and I told her I would call her in an hour or so and find out if it had been fixed. I didn't tell her to do anything in the meantime. If other trouble would develop on the line I wanted my wife to get Norman Larson to fix it if he could, and if she couldn't get Norman Larson to get someone else to fix it right away."

Shortly after this conversation it was discovered that the wire was broken. Mrs. Hill was advised and she called up the plaintiff, who is the father of deceased and who had formerly been superintendent of the plant. She asked plaintiff if he could go out and fix the wire. He told her that he could not, but asked where Norman Larson was.

Just at that time Norman Larson came into the store where plaintiff was, and he then said to Mrs. Hill, "Here is Norman Larson now, let him go." Then he glanced over his shoulder and saw Erwin, the deceased, and said, "Erwin is here, let Erwin go." After that talk with Mrs. Hill plaintiff requested Erwin to go out and fix the wire. Erwin, the deceased, and Norman Larson, together, went to fix the wire. Upon arriving at the place where the wire was broken, deceased took hold of one of the broken ends and was immediately killed.

If the deceased was an employee of the company this action cannot be maintained, because the defendant was under the workmen's compensation act and its liability in the premises was referable to the provisions of that act. The act (sec. 2394—8, Stats.) as it existed at the time of the accident provided that any employee shall be deemed to have accepted and shall be subject to the provisions of the act if at the time of the accident upon which liability is claimed the employer charged with such liability is subject to the provisions of the act and the employee shall not have given to his employer notice in writing that he elects not to be subject to its provisions.

The learned circuit judge held that the deceased was not an employee of the company, because Hill's instructions to his wife were to get Norman Larson to fix it if she could get him, and that if she could not get Larson then to get someone else, and that, as Larson was available, Mrs. Hill had no authority to employ the deceased. We regard this as too literal and narrow a construction of the authority which Mr. Hill vested in his wife. It is plain to us that the authority conferred upon her by the telephone conversation above set forth was to get someone to repair the trouble. His reference to Norman Larson was advisory merely and a suggestion which was intended to be helpful to his wife in the performance of a duty with which she was not very familiar. We have no doubt that the circumstances under which the deceased went to repair the wire constituted

him an employee of the company and that the liability of the company is measured by the terms of the workmen's compensation act. It follows that this action cannot be maintained.

By the Court.—Judgment reversed, and cause remanded with instructions to dismiss the plaintiff's complaint.

GIFFORD, Appellant, vs. STRAUB, Respondent.

September 21—October 19, 1920.

Brokers: Commissions: Necessity for written contract of employment: Sufficiency of writing: Description of premises: Certainty: Period of agency: Price designated by owner: Excess to belong to broker: Measure of compensation: Performance by broker.

1. In an action by a real-estate broker to recover a commission for the sale of defendant's farm, a written contract which described the premises as "my place" is sufficient, under sec. 2305*m*, Stats., there being no demurrer to the complaint and the evidence showing that defendant owned but one tract of land, the farm on which he lived, and that this was the land shown to the proposed purchaser and the only land the parties had in mind.
2. The writing relied on to establish such a contract need not describe the land subject to sale otherwise than by a reference therein to some extrinsic fact by means of which the land can be known with sufficient certainty.
3. Defendant's written contract to give the broker all he got for his place over $11,500 stated the amount of the commission to be paid so as to comply with sec. 2305*m*.
4. Under such contract the broker would have performed his part of the contract if he produced within the time limit a purchaser ready and willing to pay the price; he was not required to get the money and actually pay it over.
5. The words "Sep. 20—1919 exclusive sail" do not conform to the requirement of the statute that the writing express "the period during which the agent or broker shall procure a buyer," as the parties may have intended that the broker have an exclusive right of sale to September 20th and that the agency would continue indefinitely thereafter.

APPEAL from a judgment of the circuit court for Pierce county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

W. G. Haddow of Ellsworth, for the appellant.
F. M. White of River Falls, for the respondent.

JONES, J. This is an action to recover commission for services by the plaintiff, a real-estate broker, alleged to have been performed as to selling the farm of defendant.

There was a written memorandum relied on as the contract, in the following language:

"Plum City, Wis., May 20—1919.

"I agree to giv *H. M. Gifford* all he gets for my place over $11,500. Sep. 20—1919 exclusive sail.

(Signed) "MILTON STRAUB."

The court submitted the following verdict:

"(1) Did the plaintiff procure a purchaser able, ready, and willing to pay defendant $12,000 for his farm? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this: Did the plaintiff notify the defendant that he had procured such a purchaser? *A.* Yes.

"(3) If you answer the first two questions 'Yes,' then answer this: Did the defendant refuse to sell the farm to such purchaser? *A.* No."

Upon this verdict judgment was ordered and rendered for the defendant.

Considerable testimony was received bearing on the issue whether the plaintiff performed his part of the contract, and it was claimed that he did not notify the defendant that he had found a purchaser until the proposed purchaser had bought another farm and for that reason could not complete the intended purchase. In view of our conclusions as to the questions of law involved it is unnecessary to set forth the evidence.

The defendant attacked the validity of the written contract on three grounds, namely: (1) that it did not describe the premises to be sold; (2) that it did not state the commission to be paid; (3) that it did not state the period during which the agent should procure a buyer. To support

these contentions defendant's counsel relied on sec. 2305*m*, Stats., which reads as follows:

"Every contract to pay a commission to a real-estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or some note or memorandum thereof describing such real estate, expressing the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller, be in writing and be subscribed by the person agreeing to pay such commission."

In our opinion the first objection is not well founded. There was no demurrer to the complaint, and the evidence showed that the defendant owned only one tract of land, the eighty acres on which he lived, and that this was the land shown to the proposed purchaser and the only land the parties had in mind. It was objected that oral testimony identifying the land described as "my place" was not admissible for the reason that it was an attempt to contradict the terms of the written instrument, but on well settled rules this objection was not well founded. It has been many times decided in cases arising under the statute of frauds that an indefinite description does not render the contract invalid if by extrinsic evidence the land conveyed can be made certain.

The writing relied on to establish the contract need not describe the land which is subject to sale otherwise than by a reference therein to some extrinsic fact by means of which the land can be known with sufficient certainty. *Washburn v. Fletcher,* 42 Wis. 152; *Messer v. Oestreich,* 52 Wis. 684, 10 N. W. 6; *Whitney v. Robinson,* 53 Wis. 309, 10 N. W. 512; *Docter v. Hellberg,* 65 Wis. 415, 27 N. W. 176; *Singleton v. Hill,* 91 Wis. 51, 64 N. W. 588; *Inglis v. Fohey,* 136 Wis. 28, 116 N. W. 857; *Wis. Cent. R. Co. v. Schug,* 155 Wis. 563, 145 N. W. 177.

It is our conclusion that the amount of the commission to be paid is so stated as to comply with the meaning of the statute. It was argued that according to the terms of the

contract the broker was required to get $11,500 and actually pay it over to the defendant in order to comply with the terms of the memorandum, but we are not inclined to give to the instrument so strict a construction. Under the well settled rule the plaintiff would have performed his part of the contract, if it were a valid one, if he had produced within the time limited a purchaser ready and willing to pay $11,500. If no more could be obtained for the land he would have been entitled to no commission. Any excess above that amount would have belonged to the agent and would have been the measure of his compensation, or, in other words, his commission.

This excess would have been a definite amount ascertainable without any contradiction of the memorandum. The writing itself provided the mode of ascertaining the compensation, and it would be applying too strict a rule to hold that the commission is not expressed. We believe that "the word 'commission,' as used in the statute, was intended to include not merely commissions in the technical sense, but every form of compensation." *Mendles v. Danish,* 74 N. J. Law, 333, 65 Atl. 888.

The only language in the instrument relied on as complying with the language of the statute providing that there must be expressed "the period during which the agent or broker shall procure a purchaser" is in these words: "Sep. 20—1919 exclusive sail." There is some ground for the claim that these words can only mean that there was given the right of exclusive sale until September 20, 1919. On the other hand, the parties might have intended that the right to sell should be exclusive until September 20th, but that the agency would continue beyond that time indefinitely.

We therefore hold that the memorandum of agreement does not conform to the statute for the reason that it fails to state the period during which the agent should procure a buyer. This is a new statute and now comes before this court for the first time for construction. The statute was

doubtless enacted for reasons similar to those which led to the enactment of the statute of frauds. It was to prevent frauds and perjuries. Its enforcement will sometimes protect brokers who have rendered valuable services too little appreciated. More often it will protect owners from unfounded claims. It will tend to prevent the flood of litigation arising out of misunderstandings between well-meaning persons.

We believe that in order to carry out the legislative intent we should hold contracts void which do not substantially comply with the statute. In other words, that the statute means what it says. At the same time we believe that the statute should not be construed so strictly as to prevent persons unskilled in the law from drawing their own contracts, provided these contracts in effect comply with the statute.

By the Court.—Judgment affirmed.

GULESSERIAN, by guardian *ad litem*, Respondent, vs. MADISON RAILWAYS COMPANY, Appellant.

September 21—October 19, 1920.

Street railways: Collision with automobile: Negligence: Failing to give warning and keep lookout: Contributory negligence: Crossing in front of street car: Negligence of parent as imputable to minor child.

1. In an action by a minor for injuries sustained in a collision between an automobile and defendant's street car, the evidence is *held* to show that defendant was negligent in starting its car around a curve at a street intersection without warning and without keeping a proper lookout of an unobstructed view and that such negligence was a proximate cause of the injury; and also to require a finding that plaintiff's mother, driving the automobile, was contributorily negligent in attempting to cross the track in view of the approaching street car.

2. Under the circumstances, the contributory negligence of the mother is not imputable to the child so as to preclude recovery by the child against the street railway company for the injury. *Prideaux v. Mineral Point*, 43 Wis. 513, distinguished.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought for injuries to the eye of the plaintiff, alleged to have been received through negligence of the defendant. The injuries were received through a collision between a street car of defendant company and an automobile in which plaintiff was riding. The collision took place at the intersection of University avenue and Mills street in the city of Madison.

The complaint alleges, in substance, that a street car of defendant was standing on University avenue tracks near the Mills-street switch; that the defendant was negligent in that it started up the street car suddenly and turned it onto Mills street without any warning, causing it to collide with the automobile in which plaintiff was riding, when the motorman in the exercise of ordinary care should have seen that the automobile was about to cross said tracks; that the defendant was further negligent in that the street car was operated at a high rate of speed under the circumstances; that the car was not kept under proper control and that it was not stopped as soon as it could have been stopped by the motorman after he saw or should have seen that the automobile was in or near the zone of danger.

The answer denies each of the allegations of negligence set forth in the complaint; alleges that the car was operated with due care and in the manner in which street cars are customarily operated by similar companies under similar circumstances; alleges that the injuries received by plaintiff were due wholly to the negligence of plaintiff or his mother.

The case was tried before the court and a jury. By a special verdict the jury found that plaintiff's injuries were due to the negligence of defendant and that no negligence on the part of the mother of the plaintiff contributed thereto.

Judgment on the verdict was rendered in favor of the plaintiff in the sum of $713.87 damages and costs. This is an appeal from such judgment.

For the appellant there was a brief by *Jones & Schubring,* and oral argument by *E. J. B. Schubring* and *A. R. Petersen,* all of Madison.

For the respondent there was a brief by *Crownhart & Wylie* of Madison, and oral argument by *F. M. Wylie.*

Siebecker, C. J. The appellant contends that the evidence fails to sustain the jury in finding the defendant negligent. It is alleged that the motorman neglected to sound the gong as a warning when he started the street car to make the turn from University avenue onto Mills street and that he omitted to keep a proper lookout for travelers using the avenue at the Mills-street crossing. The evidence shows that no warning was given by the motorman as he started the car to make this turn onto Mills street. True, as appellant claims, Mrs. Gulesserian, when about 125 feet to the west of the car on the avenue, had observed the car standing on the north track on the avenue where all cars stop whether west-bound on the avenue or south-bound on Mills street. It appears that she continued her course of travel towards the Mills-street crossing and had reached a point about ten feet west of the Mills-street track when the motorman saw her coming; he immediately applied the brakes and stopped the car within a distance of about ten feet. This tends to show that he had taken no observation of the street to ascertain whether Mrs. Gulesserian or any other traveler was approaching the track from the time he started and crossed over the street-car tracks on the avenue up to the point where he observed Mrs. Gulesserian about ten feet from him. From this state of the evidence the jury was justified in concluding that he negligently omitted to warn approaching travelers of the starting of the street car on the turn across the avenue onto

Mills street, and that he failed to exercise ordinary care in keeping a proper lookout of the unobstructed view to ascertain whether or not travelers were approaching the track of his car at the crossing so as to avoid colliding with them. The conditions of travel on the avenue and the course in which the street car was being driven at the crossing required that the motorman keep a lookout and conduct his car with reasonable safety to protect others using the street near the crossing.

"Motormen in charge of electric cars are required, in the exercise of ordinary care, to keep a proper lookout as to the tracks and the streets upon which the cars are operated to avoid collision with persons and vehicles on the street. . . . He must observe the streets adjacent to the track sufficiently to enable him to ascertain whether persons are approaching or are about to approach the track, and, if such persons are in danger of being struck by the car, he must do all that an ordinarily careful and prudent motorman would do to avoid injury." *Glettler v. Sheboygan L., P. & R. Co.* 130 Wis. 137, 109 N. W. 973; *Dahl v. Milwaukee City R. Co.* 65 Wis. 371, 27 N. W. 185.

It is considered that the verdict finding the defendant guilty of negligence and that this negligence was a proximate cause of plaintiff's injury must stand.

It is averred that Mrs. Gulesserian, the driver of the automobile, was guilty of contributory negligence in causing the collision. It appears that she was driving her car at a speed of from eight to twelve miles per hour from the time she first saw the street car standing on the avenue, about 124 feet distant from her, up to the time of collision; that she had a clear view of the street car at all times; that she did not know whether the car was a west-bound or south-bound car; that she continued to approach the Mills-street crossing, looked to the south on Mills street for approaching street cars or automobiles and for travelers near the crossing on the avenue and Mills street, and failed to look for the street car before attempting to cross the Mills-

street track until she was within about ten feet of the car approaching her. There was nothing to prevent her from seeing the car at any time while she drove the automobile a distance of about 114 feet, nor from stopping the automobile before entering the zone of danger. It is urged that she was excused for her failure to look for the street car as she approached the track because she was engaged in looking to the south to ascertain if any car or vehicle was approaching her course of travel and that this absorbed her attention, and that since the street-car gong had not been sounded to warn her of its starting she rightfully assumed that she had a safe course to cross the Mills-street track before the car would reach her. This claim is refuted by the fact that the street car was plainly in her view from the time it started and had traveled a distance of fully fifty feet and that she could readily have cast her view towards it while driving the automobile. She was aware that the car was there to go either west on the avenue or south on Mills street. Under these circumstances it seems inexcusable for her to attempt to cross the Mills-street track without looking in time to see whether or not the car was coming on the Mills-street track and in failing to stop her automobile before entering the zone of danger. These circumstances permit of but one inference, namely, that Mrs. Gulesserian was guilty of a want of ordinary care in attempting to cross the street railway as she did in view of the approaching street car with which the automobile collided. The trial court erred in not granting defendant's motion to change the jury's answers to questions 5, 6, and 7 from "No" to "Yes."

The question remains, Is such contributory negligence of Mrs. Gulesserian imputable to this infant plaintiff? The proposition that the contributory negligence of a parent, concurring with the negligence of a third person, which proximately caused an injury to a child, precludes the parent from recovering damages from such third person resulting

from such injury to the child, is recognized in the cases in this court cited to our attention by appellant's counsel. These adjudications, however, do not rule the instant case. No case is cited, nor has any case been called to our attention, holding that such contributory negligence of the parent is imputable to the child in an action by the child to recover damages for an injury for the actionable negligence of such third person. On the question whether, in an action by a child of tender years to recover damages for an injury caused by the actionable negligence of a third party, the contributory negligence of the parent having care of the child is to be imputed to such child to bar recovery by the child, the adjudications are in conflict. Several jurisdictions, including New York and Massachusetts, hold that such contributory negligence of the parent defeats the child's action. But the great weight of authority is to the contrary, holding that the negligence of the parent having custody of the child contributing to the injury of the child will not be imputed to the child to bar its right of action for actionable negligence against a third person.

In *Mattson v. M. & N. W. R. Co.* 95 Minn. 477, 104 N. W. 443, the court reconsidered this question and reversed its former decision on the subject in the case of *Fitzgerald v. St. P., M. & M. R. Co.* 29 Minn. 336, 13 N. W. 168. It is there declared:

"The right of an infant to damages for injuries to his person caused by the wrongful act of others is a property right, and entitled to the same protection in the courts as is accorded other property held or owned by him. He is entitled to the protection of the law equally with persons who have attained their majority, and to refuse him relief on the ground of his parents' indifference or negligence would be to deny it to him. To impute to him negligence of others is harsh in the extreme, whether the negligence so imputed be that of his parents, their servants, or his guardian."

Bishop (Non-Contract Law, § 583) characterizes the imputed negligence doctrine as to children ". . . as flatly in

conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his parent was poor or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it."

The cases bearing on this question and on the question of the rights of parents and other beneficiaries to recover for injuries to infants proximately caused by the actionable negligence of others contributed to by parents and custodians of such infants are collected in 21 L. R. A. 76, note to *Chicago City R. Co. v. Wilcox* (138 Ill. 370, 27 N. E. 899), 20 Ruling Case Law, pp. 153–157, §§ 128, 129; 38 L. R. A. N. S. 754, note to *Nashville L. Co. v. Busbee,* 100 Ark. 76, 139 S. W. 301; 18 L. R. A. N. S. 320, note to *Neff v. Cameron,* 213 Mo. 350, 111 S. W. 1139; and in *Feldman v. Detroit U. Ry.* 162 Mich. 486, 127 N. W. 687, where the court declares:

"We find from an examination of the authorities that the question has been considered by the courts in three classes of cases: (1) In actions brought by the child in its own right. (2) In actions brought by the parents for loss of services. (3) In actions brought under Lord Campbell's Act by the personal representatives of the child to recover for loss of services to the parent. In the first class of cases, by the great weight of authority, it is held that the negligence of the parent cannot be imputed to the child. In the second class the negligence of the parent will bar the action. In the third class, where, although the action is brought by the personal representative for the benefit of the child, if the parent is the real beneficiary his contributory negligence will be imputed to the child." See cases cited in the opinion of the court.

It is considered that the doctrine approved in the foregoing citations and authors holding that the contributory negligence of the parent or custodian of the child will not preclude recovery by the child for negligent injury, is a

just rule and should be adopted in the jurisprudence of this state. We do not regard the observations made in *Prideaux v. Mineral Point,* 43 Wis. 513, as controlling in this case. It is there stated: "When *paterfamilias* drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence." Furthermore, this observation of the court was made where the husband and wife brought action for injuries to the wife caused by a defective highway. The question above mentioned was not involved in the case.

By the Court.—The judgment is affirmed.

JONES, J., took no part.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. WISCONSIN ZINC COMPANY and others, Respondents.

September 21—October 19, 1920.

Public utilities: Railroads: Cost of constructing sidetrack: Determination by railroad commission: Constitutional law: Delegation of legislative power: Review of order of railroad commission.

1. A railroad company that has constructed a spur track for an industry cannot, under ch. 352, Laws 1907, as amended by ch. 481, Laws 1909 (sec. 1797—11*m*, Stats.), maintain an action to recover the cost thereof without first having the railroad commission determine the same in separate items.
2. The determination of the cost of a spur track under sec. 1797—11*m* is the determination of a pure question of fact that may be delegated to the railroad commission, its action thereon involving no judicial or legislative function. *Union Lime Co. v. Railroad Comm.* 144 Wis. 523, followed.
3. The review of an order of the railroad commission determining the legitimate cost of a spur track under said sec. 1797—11*m* may be had under sec. 1797—16, being an order fixing a charge for a service rendered by the railroad company.

Appeal from an order of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Affirmed.*

Action to enforce payment of the cost of a spur track built under the provisions of sec. 1797—11*m*, Stats. A general demurrer was interposed and sustained on the ground that the complaint failed to show that the railroad commission had determined the cost thereof, which it is claimed must be done under said section before a cause of action accrues to the railroad company. The plaintiff appealed.

For the appellant there was a brief by *R. N. Van Doren* of Milwaukee, attorney, and *Nelson J. Wilcox* of Chicago, of counsel, and oral argument by *Mr. Van Doren.*

For the respondents there was a brief by *Kopp & Brunckhorst* of Platteville, and oral argument by *Arthur W. Kopp.*

Vinje, J. When the spur-track law was first enacted by ch. 352, Laws 1907, it provided that the railroad

"may *request* the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor."

This was amended by ch. 481, Laws 1909, to read:

"Such railroad may *require* the person or persons, firm, corporation or association primarily to be served thereby, to pay the legitimate cost and expense of acquiring, by condemnation or purchase, the necessary rights of way for such spur track, and of constructing the same, *as shall be determined in separate items by the commission,* in which case the total estimated cost thereof shall be deposited with the railroad before the railroad shall be required to incur any expense whatever therefor."

This was followed by provisions permitting the industry

served by the spur track to construct the same itself under conditions named, and requiring the industry to give a bond to the railroad in addition to the deposit of the estimated cost of the track.

The question raised by the appeal is whether a railroad that has constructed a track for an industry can, under the amended law, maintain an action to recover the cost thereof without first having the commission determine the same. Plaintiff claims the amendment requires the commission only to determine the estimated cost thereof in separate items, and that it can sue for the amount claimed due for the construction of the track without having the cost thereof determined by the commission. The defendant claims that the commission must determine the legitimate cost of the track and not until that is done can an action be maintained, and then only in such amount as is determined by the commission, if its order determining the cost is not reviewed or is affirmed on review. The trial court held the complaint defective because it did not allege a determination of the cost of the spur track by the commission.

It will be noticed that the law as originally enacted provided for the estimated cost of the track to be deposited though it was silent as to who should estimate it. Such law gave the railroad, in terms, only the right to *request* payment, while the amended law gives it the right to *require* payment.

In view of the language of the amendment, the history of its origin, the conditions under which rights of way must be acquired and spur tracks constructed, we think it quite plain that it was the legislative intent to require the industry to pay the legitimate cost of the track as determined in separate items by the commission. That is the natural construction of the language used, and there are good reasons for such a provision. It is impossible to estimate the exact cost of a spur track to be built in the future. What the right of way will cost may not be known, but if it is, the

cost of labor and material fluctuates from time to time so that the actual cost cannot be known till the work is done. The legislature has clearly recognized this condition by requiring the industry served to give a bond in addition to a deposit of the estimated cost so as to fully indemnify the railroad. It no doubt also recognized the fact that there should be some protection to the industry against unreasonable claims as to the cost of track by requiring the commission to determine the same in separate items. The commission is eminently qualified to perform this service, and its determination will in most cases no doubt be final.

In the instant case it is alleged that the reasonable cost of the spur track was $125,907.89, its estimated cost $83,000. This shows how widely the estimated cost and the actual cost may vary; and it also shows the desirability, if not the necessity, of having the commission audit the claim of the railway company and determine the legitimate cost of the construction of the track. The industry is thus protected from waste, extravagance, or negligence in its construction, and is required only to pay such amount as an ordinarily prudent, economical, and lawful construction requires.

The law also devolves upon the commission the duty of ascertaining the equitable share of the primary cost of construction which another industry shall pay for a joint use of the spur track. Sub. 3, sec. 1797—11*m*, Stats. This also indicates the duty of the commission to determine the legitimate cost of the track, if the language declaring that an industry furnished with a spur track shall pay the railroad "the legitimate cost and expense of . . . the rights of way for such spur track, and of constructing the same, as shall be determined in separate items by the commission," needs support from other parts of the law to sustain the construction given it. We think the words "as shall be determined in separate items by the commission" are plain, unambiguous, and mean just what they say, namely, that

the commission shall determine the legitimate cost of the spur track which the industry must pay. Further discussion would seem to becloud rather than elucidate the subject.

The determination of the actual cost of a spur track is the determination of a pure question of fact that may be delegated to the commission. Its action thereon involves no judicial or legislative function. *Union Lime Co. v. Railroad Comm.* 144 Wis. 523, 129 N. W. 605. In that case it was held that the determination of the questions whether a spur track is practically indispensable to the successful operation of an industry; whether its operation is unusually unsafe and dangerous; and whether it is unreasonably harmful to public interest, were questions proper to be delegated to the commission because their determination did not involve the exercise of judicial or legislative power. Much less so does the determination of the legitimate cost of the track. It is the mere ascertainment of an existing fact.

That a review of an order determining the legitimate cost of the track may be had under the provisions of sec. 1797—16, Stats., seems quite plain. It is an order fixing a charge for a service rendered by the railroad and therefore subject to review under said section.

By the Court.—Order affirmed.

ROSENBERRY, J., dissents.

BROWN and another, Appellants, vs. MARTY, Respondent.

September 22—October 19, 1920.

Brokers: Contract of employment: Necessity for writing: Sufficiency: Duration of agency: Description of lands.

1. A writing signed by the defendant landowner and plaintiffs, real-estate brokers, gave the brokers the exclusive right to sell defendant's farm and contained this clause: "the first party [owner] reserves the right to revoke this agreement by giving three months' notice in writing." *Held,* that the

time of duration of the contract is sufficiently definite to comply with sec. 2305*m*, Stats., which requires that the writing express the period of the broker's agency. This statute is to be regarded as an extension of the statute of frauds and governed by the principles applicable thereto.

2. Since the contract described the lands as the property owned by the defendant in sections 35 and 36 in a designated town, the allegation of the complaint that the plaintiffs sold the lands described in the writing by land contract, a copy of which was annexed to the complaint, is sufficient to admit evidence that defendant owned the land described in the land contract and no other to which the description in the commission contract was applicable.

Appeal from an order of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Reversed.*

Commission contract. Demurrer. The plaintiffs are partners engaged in the real-estate business. They made a contract with the defendant to sell his farm and claim to have sold his lands, and bring this action for compensation. The defendant demurred to the complaint, and from an order sustaining the demurrer the plaintiffs appeal.

For the appellants there was a brief by *Hill & Spohn* of Madison, and oral argument by *W. H. Spohn.*

For the respondent there was a brief by *Gettle, Torge & Stolen* of Madison, and oral argument by *O. H. Stolen.*

Rosenberry, J. This appeal requires a construction of sec. 2305*m*, Stats.:

"Section 2305*m*. Every contract to pay a commission to a real-estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or some note or memorandum thereof describing such real estate, expressing the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller, be in writing and be subscribed by the person agreeing to pay such commission."

The question raised is whether or not the contract between the parties expresses "the period during which the

agent or broker shall procure a buyer or seller," the language of the contract being, "said second parties [agents and appellants] hereby are given the exclusive right to sell, but the first party [owner and respondent] reserves the right to revoke this agreement by giving three months' notice in writing." Restated the question is, Does the language, "the first party reserves the right to revoke this agreement by giving three months' notice in writing," express the period during which the plaintiff shall procure a buyer or seller? This statute was before the court in *Gifford v. Straub,* decided herewith (*ante,* p. 396, 179 N. W. 600). What is said there need not be repeated here.

A very persuasive argument can be made, taking the language of the statute literally, that the contract in question did not express any period of time. When the contract was made and delivered no person then in existence could tell during what time the contract might operate. The owner might give notice within a week, within a year, or within any period which might, under the circumstances, constitute a reasonable time, and the contract would terminate three months after the giving of such notice in writing, so that in that sense no definite period of time was stated.

A like argument can be made with reference to the construction and interpretation to be placed upon the statute of frauds. Sec. 2304 requires that every contract for the sale of lands shall "express the consideration." It has been held under this provision that the words "value received" constitute a sufficient compliance with the statute, although, of course, resort must be had to oral testimony to show what the consideration in fact was.

There is nothing in the history of the litigation respecting controversies between real-estate brokers and their clients or in the evils arising out of such relationships that leads us to suppose that the legislature intended to prohibit the making of a large class of contracts which were there-

tofore valid and proper. Contracts terminable at the will of one of the parties upon notice are very common. The intent of the legislature no doubt was to limit the making of such contracts by requiring that they should be in writing, not to prohibit the making of the contracts. All such contracts, prior to the enactment of state statute, extended over some period of time. If no period was specified they were terminable at will upon reasonable notice. This left open to dispute and subsequent litigation the question of what constituted a reasonable time, and there is no doubt but that was what was aimed at by inserting in the statute the provision referred to. There is nothing in the act or in the circumstances to which it is applicable that leads us to suppose that the legislature intended that the contract should be so definite and certain in respect of time that there should be in every case no necessity to resort to parol evidence or proof outside of the contract as to its duration. At least we shall follow the precedents derived from the decisions construing and interpreting the statute of frauds, and if in so doing we do not carry out the legislative intent it is a matter easily remedied. On the other hand, if the statute should be so construed as to prohibit entirely the making of a large class of contracts hitherto perfectly valid and not subject to the criticism applicable to oral contracts between real-estate brokers and their clients, it might work great hardship. If such was the legislative purpose it should have been clearly expressed. We prefer to adopt, therefore, that construction which will cure the evil and at the same time limit as little as possible the right of parties to contract. The right of contract should not be restricted further than it is necessary to go in the interest of the general welfare. Regarding the statute, therefore, as an extension of the statute of frauds and applying the principles applicable to that statute to this statute, we think the contract in question is sufficiently definite in expressing the time of duration in that it provides a method by which the

duration of the contract may be absolutely fixed, to wit, three months after the giving of written notice by the owner. Within the rule announced in *Gifford v. Straub, supra,* we think the description here is sufficiently definite. The description is as follows: "The property owned by the first party described as follows: 200 acres in Sections 35 and 36, Town of Springdale, Dane Co., Wis." The complaint alleges that the plaintiffs sold the premises described in the commission contract to one Andrew Olson by land contract, a copy of which is annexed to the complaint. In the copy attached to the complaint the premises are described by government subdivisions, and while the complaint does not say in terms that the defendant owned no other premises in sections 35 and 36, we think the allegation of the complaint sufficient to admit evidence that he owned the land described in the land contract and no other to which the description was applicable, and that the description of the premises therefore is sufficiently definite.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

STATE, Appellant, vs. SNYDER and others, Respondents.

September 22—October 19, 1920.

Attorney general: Duties and powers: Right to institute actions: Workmen's compensation: Duty to defend awards of industrial commission: Action in which state is interested as party.

1. The attorney general of Wisconsin has no common-law powers or duties; his duties spring from statute, and he must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity.
2. Under sec. 14.53, Stats., the attorney general has no power to prosecute any action in the circuit court, except in cases remanded by the supreme court, unless requested by the governor or either branch of the legislature, or in cases specifically authorized by statute, as in sec. 3236.
3. Though a provision of the workmen's compensation act requiring the attorney general to defend the awards of the

industrial commission contravenes other general provisions found elsewhere in the statute, by familiar rules of statutory construction the special provision, dealing with a particular subject, prevails over the other general provisions.

4. The statutory duty of the attorney general being to defend the awards of the industrial commission, the governor cannot impose upon him duties in conflict therewith. [*Quære,* whether the spirit of the workmen's compensation act does not suggest acquiescence on the part of the state in decisions of the industrial commission upon questions affecting the duty of the state towards its injured employees.]

5. Where, without authorization of the governor, the attorney general brought an action in the circuit court to review an award of the industrial commission in a case in which the state was interested, and the governor failed to direct him to bring the action until more than twenty days from the date of the order or award, the circuit court was without jurisdiction of the action, notwithstanding a *nunc pro tunc* direction of the governor to the attorney general to bring the action, and a motion to dismiss should have been granted. *Hammond-Chandler L. Co. v. Industrial Comm.* 163 Wis. 596, distinguished.

Appeal from a judgment of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Reversed.*

Action brought in the circuit court for Dane county to review an award of the *Industrial Commission.* From a judgment of that court affirming the award the state brings this appeal.

For the appellant there were briefs by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

David C. Pinkerton of Oshkosh, for the respondents *Snyder* and *McDonald.*

Byron H. Stebbins of Madison, for the respondent *Industrial Commission.*

Owen, J. The question that first presents itself is whether the court has jurisdiction of the action. The award of the *Industrial Commission* was made on the 14th day of June, 1919. This action was brought by the attorney

general June 20, 1919. It was brought on his own initiative, without authority from the governor. On the 17th day of November, 1919, a motion to dismiss the action was made in the circuit court. On the 7th day of November, after notice of said motion to dismiss had been given, the governor wrote the attorney general a letter in which he assumed to ratify and confirm on behalf of the state the action on the part of the attorney general in bringing the suit, and requested him, as of the date of the order and award of the *Industrial Commission,* to bring the action in the circuit court for Dane county for the review of such order and award.

In this state the attorney general has no common-law powers or duties. His duties spring from the statute, and he must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity. *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900; *State ex rel. Haven v. Sayle,* 168 Wis. 159, 169 N. W. 310. Sec. 14.53, Stats., provides that the attorney general shall

"Appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded by the supreme court to any circuit court in which the state is a party; and, when requested by the governor or either branch of the legislature, appear for the state and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people thereof may be in any wise interested."

If he had any power or authority to bring the instant action it was by virtue of the language just quoted. That it falls far short of conferring authority upon him to bring the action is apparent upon casual reading. He has no power to prosecute actions in the circuit court, except in cases remanded by the supreme court, unless requested by the governor or either branch of the legislature, or in cases

specifically authorized by the statute, such as sec. 3236, Stats.

Sec. 2394—22, Stats., provides that

"In any action for the review of an order or award, and upon any appeal therein to the supreme court, it shall be the duty of the attorney general, personally, or by an assistant, to appear on behalf of the commission, whether any other party defendant shall have appeared or be represented in the action or not."

This provision lays upon the attorney general the duty to defend the awards of the *Industrial Commission.* No exception is made where the state is a party. Even though this provision contravened other general provisions elsewhere found in the statutes, by familiar rules of statutory construction this special provision, dealing with a particular subject, would prevail over such other general provisions. But this provision does not contravene any other provision in the statute specifying, generally, the duties of the attorney general. His statutory duty, therefore, is to defend the awards of the *Industrial Commission,* and the governor cannot, if he would, impose upon him duties in conflict therewith. Furthermore, there is a very practical reason why the attorney general should consistently defend the *Industrial Commission.* If he is to defend the actions of the *Industrial Commission* as a general proposition and assail them when the state is adversely interested, he may easily find himself embarrassed by being forced into inconsistent positions. That very situation would arise if this case and *Holt L. Co. v. Industrial Comm.* 168 Wis. 381, 170 N. W. 366, were concurrently pending, as, upon the merits, this case is ruled by that, as was held by the lower court. If they were pending at the same time, every argument made by the attorney general in this case would tend to impeach the action of the *Industrial Commission* in that, and every effort made by him to sustain the action of the *Commission* in that case would be against the position he

seeks to maintain in this. Such a situation would be embarrassing to the attorney general and detract from the value of his services to the *Commission*. In the interest of good administration, if for no other reason, it should be avoided.

Furthermore, we may be permitted to suggest, for the consideration of the administrative and executive officers of the state, whether the spirit of the workmen's compensation act does not suggest acquiescence on the part of the state, as a general policy at least, in the decisions of the *Industrial Commission* upon questions affecting the duty of the state toward its injured employees. The state has set up this *Commission* for the administration of the act, giving it dignity by conferring upon it broad powers and limiting the right of judicial review of its acts within an exceedingly narrow scope. It has put the prestige and force of the state back of its orders and awards, by providing that in every action brought to review its awards it should be defended by the attorney general of the state. Notwithstanding the attorney general is commonly regarded as the principal law officer of the state, the legislature provided in plain and deliberate language that he should defend the *Industrial Commission* in any action brought to review its awards, without making an exception in case of an action brought for that purpose by the state, or making other provision for representation in the proceeding. That such provision was deliberate may well be believed when we consider the finality attaching to the decisions of the *Commission*. Of necessity, the duty of the state must be determined by some state officer or agency. What better agency can determine that duty than the *Commission* itself, experts and specialists in such matters? When that duty has been declared by the *Commission*, and the principal law officer of the state directed to defend it, its pronouncements, it seems to us, should be challenged by other state officers with considerable reluctance.

A motion to dismiss the action was made in the circuit court, which motion was denied on the authority of *Hammond-Chandler L. Co. v. Industrial Comm.* 163 Wis. 596, 158 N. W. 292, it being the opinion of the court that the want of authority on the part of the attorney general was comparable to the defective manner of starting an action in which the summons was signed by attorneys not resident of the state. One complete answer to that position is that a competent attorney has not yet been authorized to represent the state in this action. The attorney general is prevented by law from acting in opposition to the *Industrial Commission* and is wholly disqualified to bring or maintain this action. Furthermore, we think the situation here entirely different from the one considered in *Hammond-Chandler L. Co. v. Industrial Comm., supra.* In that case the party had made a *bona fide* effort to bring the action, but acted ineffectively because he caused the summons to be signed by attorneys who had no authority to do so. In the instant case the party is the state. In authorizing the commencement of this action it could act only through the governor. The governor did not act until November 7th. The action is required to be commenced within twenty days from the date of the order or award. Had he acted deficiently or ineffectively the case might fall within the principle of the *Hammond-Chandler Case.* But he failed to act at all. His failure to act was the failure of the state to act. The action of the attorney general was no more the action of the state than if any other unauthorized officer or employee had caused the bringing of the action. To permit the governor to act *nunc pro tunc,* as was attempted, is to enlarge the time for bringing the action and to set aside a statute of limitations. The action not having been brought within the time prescribed by statute, the court is without jurisdiction, and the motion to dismiss the action made in the lower court should have been granted.

It should be said that this disposition of the case consti-

tutes no reflection upon the attorney general. His activity in the matter was due entirely to his usual commendable fidelity to the interests of the state, which in a very general way is his client, so to speak. In the practical administration of his office he becomes imbued with the thought that it is his duty at all times to protect the state and its interests, and that where there is seeming conflict the state has first claim upon his services. His error here was very natural, and we think commendable rather than otherwise.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action.

VALE, Respondent, vs. NOE, Appellant.

September 22—October 19, 1920.

Physicians and surgeons: Malpractice of dentist: Res ipsa loquitur: Burden of proof: Evidence.

1. In an action against a dentist to recover for injuries sustained when an electrically driven disk slipped from plaintiff's tooth to the bottom of her mouth, the burden is on the plaintiff to establish that the injury was the result of the negligence of the dentist.
2. Negligence of the defendant cannot be inferred from the mere fact of injury to the patient, there being no room for the application of the doctrine of *res ipsa loquitur,* as the injury may have been the result of pure accident or of an involuntary movement by the patient; nor could negligence be inferred merely because of defendant's failure to cut off the power from the disk instantaneously with the happening of the accident.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Malpractice. The defendant is a dentist, residing in the city of Madison. He was preparing the last tooth on the lower left jaw of the plaintiff to receive a crown when the disk or stone, which is about one thirty-second of an inch in thickness and five-eighths of an inch in diameter, slipped

from the tooth, cut a considerable gash in the bottom of the plaintiff's mouth, cut her tongue, and occasioned the damages for which this action is brought. It was claimed by the plaintiff that the injuries sustained by her were the result of a failure on the part of the defendant to exercise due and proper care and skill as a dentist or dental surgeon in operating upon and treating her teeth, and that, while using the stone operated by electricity, the defendant negligently and carelessly caused it to produce the injuries complained of. It was the contention of the defendant that the injuries were due to the fact that the plaintiff moved her tongue or jerked her head and were therefore the result of her own negligence. Upon the trial the jury found that the appellant failed to exercise ordinary care; second, that the injury to the respondent was the natural and probable result of such failure; third, that the appellant, a person of ordinary intelligence and prudence, ought to have foreseen that an injury might result from such failure; fourth, that the respondent, immediately before the injury, did not move her tongue suddenly or violently and did not jerk her head, and assessed the damages at $475. There was a motion to set aside the verdict and for a new trial. The trial court was of the opinion that the defendant having testified that "if he had removed his foot from the control lever immediately upon the stone leaving the tooth, the stone would have stopped before it inflicted the injury here in question. With this testimony of the defendant before it, it became a question of fact to be determined by the jury whether, in view of the circumstances under which the defendant acted, he exercised reasonable care and skill in failing to stop the stone before it inflicted the injury," therefore denied the motions. Plaintiff had judgment upon the verdict, from which the defendant appeals.

The cause was submitted for the appellant on the brief of *Curkeet & Lewis* of Madison, and for the respondent on that of *Gilbert, Ela & Heilman* of Madison.

ROSENBERRY, J. That the plaintiff sustained an extensive cut and severe injuries to her mouth and tongue, that such cut and injuries were caused by reason of the fact that the disk passed from the tooth to the bottom of the plaintiff's mouth and came in contact with her tongue, cannot be denied. The burden of proof, however, is upon the plaintiff to establish by a fair preponderance of the evidence that such cut and injury was the result of the defendant's negligence before any legal liability on his part can be predicated thereon. We give much weight to the determination of trial courts in matters of this kind, and it is only when we are convinced that the trial court is clearly in error that his rulings are disturbed.

There is no room here for the application of the doctrine of *res ipsa loquitur*. Negligence of the defendant cannot be inferred from the fact of injury under the circumstances in this case. This injury may be the result of pure accident, it may be the result of an unconscious, involuntary movement on the part of the plaintiff. The finding of the jury that she did not move her head was necessarily based solely on the testimony of the plaintiff. She may have moved her head involuntarily or the action of her muscles may have been spasmodic. The fact that the cut is in the bottom of the mouth at the juncture of the tongue with the bottom of the mouth is a circumstance which indicates that the tongue was moved in some way from the position occupied just before the accident. The finding of the jury amounts to a finding that she did not consciously move her head or jerk her tongue, and no more. The burden is upon the plaintiff to eliminate these possibilities and establish affirmatively the fact that the injuries were the result of the defendant's negligence. The trial court correctly pointed out the only testimony upon which such an inference could be based, and we are called upon to determine whether or not it may properly be deduced therefrom in the light of all the evidence in the case. The plaintiff testified:

"I was conscious of the passing of the instrument from my tooth to my tongue and felt the instrument leaving the tooth. It was just like that [snap of the finger]. It was that quick. From the time it left the tooth until the laceration occurred it was a very short space of time, almost instantaneous as near as I could tell. I wouldn't think that there was any space of time there that I could measure."

The defendant testified:

"If it were possible for me to have immediately removed my foot at the time the stone left the tooth the injury would not have happened. After the stone left the tooth, in the movement, I tried to protect the patient as much as possible. . . . There was no cut on the side of the tongue, but it was all in the soft tissues at the junction of the tongue with the floor of the mouth. I had an impulsive idea as to what I was trying to do to avoid injury and had a clear knowledge of what I was doing. I had no time to form a plan, and my motion in trying to keep the stone above the tongue was impulsive without time to think it out. . . . I knew while the stone traveled the one and three-eighths inches that it had left the tooth, and when the stone started to penetrate the tongue, stopped it as instantly as could be. If it had been possible to have taken my foot off the control I probably would have done it. The convulsion prevented my shutting off the power because my mind was centered on trying to dodge the tongue. I shut the power off as instantly as I could, and I doubt whether I can handle my foot as quickly as my hand. . . . I didn't take my foot off the control instantly because it all happened instantly."

Upon consideration of all the evidence, only part of which is set out here, we are convinced that there was no room for an inference of negligence on the part of the defendant merely because of his failure to shut off the power more instantaneously, so to speak, than the accident itself happened. It is a matter of common knowledge that it requires an appreciable time for the mind and muscular system to act. The evidence of both the plaintiff and the defendant establishes the fact that the time within which the accident began, happened, and terminated was an instant of time.

How can it be said that the defendant was negligent by reason of his failure within that instant to have shut off the power so as to have prevented the accident? In holding that negligence might be inferred from this circumstance, we think the trial court was in error. There being no other evidence of negligence on the defendant's part, the motion to set aside the verdict should have been granted.

By the Court.—Judgment reversed, with direction to dismiss the complaint.

KLITZKE, Respondent, vs. DAVIS, Appellant.

September 22—October 19, 1920.

Breach of marriage promise: Evidence: Seduction: Testimony of plaintiff: Damages: Elements: Seduction prior to marriage promise: Amount of damages: Punitive damages: Trial: Failure to request instructions: Result probably not different if instruction had been given.

1. In an action for breach of marriage promise, where plaintiff's testimony was somewhat confused and perhaps conflicting yet emphatic on the subject, the jury was justified in believing her testimony that her seduction took place after a mutual agreement to marry.
2. Failure to instruct that if a marriage promise was in consideration of illicit intercourse it was void was not reversible error where no such defense was pleaded nor such an instruction requested, and where, even if it had been given, it is probable from the evidence that the jury would have found that the seduction took place after the promise of marriage.
3. Since the breach of marriage promise involved plaintiff's seduction, the jury had the right to consider the usual elements of damages in actions of this character, including plaintiff's disappointment in her reasonable expectations of pecuniary advantage from the marriage, the injury to her feelings, and the mortification and mental suffering which followed the breaking of a long engagement, and her dissuasion from association with other men for such period, rendering the possibility of another marriage more remote.
4. An instruction that, if there was sexual intercourse while there was no promise to marry, the plaintiff would not be entitled

to recover therefor, but that if the defendant, by reason of the promise of marriage, was enabled to and did seduce the plaintiff, this seduction might be taken into account in aggravation of damages, was proper.

5. Where plaintiff was seduced by defendant, who without just cause broke his promise of marriage, impairing her social standing and darkening her life, although there was no proof of property owned by defendant, since the amount of damages in such cases is peculiarly within the jury's province a verdict of $5,000 compensatory and $1,500 punitive damages, not reduced by the trial court, is not so large as to indicate passion or prejudice.

Appeal from a judgment of the circuit court for Sauk county: James O'Neill, Judge. *Affirmed.*

This was an action brought for breach of promise of marriage. In aggravation of damages it was alleged that by reason of the promise defendant had seduced the plaintiff. The answer denied the contract. On a directed verdict on the ground that the only question for the jury was that of damages, the jury found for the plaintiff in the sum of $5,000 compensatory damages and $1,500 punitory damages.

The proof showed that the plaintiff at the time of the alleged contract was aged twenty-seven years and the defendant twenty-two years. The parties had known each other from childhood and attended the same district school near Reedsburg. Defendant had received a high school education, had attended Carroll College at Waukesha and the State University for a time, and had studied engineering for two years. He began paying attention to plaintiff in the summer of 1915, and while at the University in 1917 and 1918 wrote letters to the plaintiff, and when he visited his home was in the habit of going to see her.

The plaintiff testified that the first offer of marriage was in a letter from defendant about the middle of June, 1916. That later he came to her house and he asked her to marry him and she accepted the offer. She testified that he had proposed sexual intercourse before this and she had refused;

that after the promise of marriage the proposal was renewed and she yielded to his wishes, and that after this the relation was continued whenever there was opportunity—and marriage was talked of right along. Defendant testified that sexual intercourse began in 1915 and continued whenever there was opportunity. The defendant went into the army in April, 1918. It was agreed that their correspondence should be destroyed, but after he entered the service plaintiff kept the letters she received. These letters were affectionate and clearly showed that there had been a marriage agreement; they expressed regret that they had not been married before; stated that they would have been married but for the war; asked her to wait until his return, begged her to remain true to him, and spoke of the time when they would be united.

About May, 1919, the defendant returned from overseas. Plaintiff testified that after his return defendant called a few times and asked that the marriage be postponed for a time in order that he might rest, to which she consented. Defendant then discontinued his visits. Plaintiff went to see him, when he asked to be released. He afterward called upon her again. Plaintiff swore that he said he had been going out with other women, and that when she refused to release him he threatened to shoot her if she made trouble, and that even after this he compelled her to have sexual intercourse.

According to the testimony of the plaintiff, defendant assigned as a reason for wanting the engagement broken that his folks did not want him to marry her, that he had a lot of money coming from home, and if he married her he would get kicked out and he would never dare to show up at home again. About a week after this statement he married another woman without any further notice to the plaintiff.

Defendant's attorneys moved for a nonsuit, which motion was overruled. The plaintiff's attorneys moved for a directed verdict. The court held that the undisputed evi-

dence showed that there had been a contract of marriage and that defendant had broken it, and the only question in the case was the assessment of damages.

For the appellant there was a brief by *Stone & Quimby* of Reedsburg, and oral argument by *James A. Stone.*

For the respondent there was a brief by *Bentley, Bowler & Lamar* of Baraboo, and oral argument by *Frank R. Bentley.*

Jones, J. In this action the complaint alleged the marriage contract, the plaintiff's willingness to perform it, that she was debauched by reason of the contract, and that the defendant refused to carry out his promise.

The answer denied that the agreement was made, and alleged that at the date of the alleged contract defendant was much younger than she and that by reason of greater age and experience the plaintiff had debauched him.

From the cross-examination of the plaintiff we infer that the defense chiefly relied on was that the promise to marry was in consideration of sexual intercourse and therefore illegal. This claim and the claim that the damages allowed were excessive are earnestly urged in the brief for appellant.

There is a direct conflict in the testimony of the parties as to the time of the agreement to marry. The plaintiff testified that it was made some days before July 18, 1916, when, according to her statement, the first sexual intercourse took place. According to defendant's testimony the sexual relations began in 1915, and no marriage agreement was made until 1918 and while he was in France.

Doubtless all this testimony was considered by the jury, and from their verdict it is fair to assume that they believed the plaintiff's statement to the effect that she had repeatedly been solicited to comply with his desires but had refused until after the mutual agreement to marry had been made and for some days thereafter. Although dur-

ing the severe cross-examination of plaintiff her testimony was somewhat confused and perhaps even conflicting, she was emphatic in her testimony on this subject. We cannot say that the jury was not justified in believing her.

It is urged by appellant's attorneys that the court erred in holding that the only question for consideration was that of damages. It suffices to say that the defendant admitted that he had made the promise while overseas and that his letters to her clearly prove the promise.

It is argued that the court erred in failing to instruct the jury that if the promise was made in consideration of illicit intercourse it was void. The circuit judge gave no such instruction. He may have considered this unnecessary because no such defense was pleaded or because no such instruction was asked. If he had given elaborate instructions on this point, it is probable from the evidence that the jury would have found that the seduction took place after the promise of marriage. The following statement of this court in *Falkner v. Schultz,* 160 Wis. 594, 150 N. W. 424, where a similar question arose, is quite applicable:

"The answer to this contention is that there is ample evidence that the promise of marriage was not based upon an illegal consideration, viz. illicit intercourse, and that the seduction occurred after the promise of marriage, and that such promise of marriage by defendant was frequently repeated and renewed on different occasions when the plaintiff yielded her person to defendant."

It is argued that the damages allowed are excessive; that the plaintiff was older than defendant by about five years; that there was no proof that the defendant had property. The jury had the right to take into consideration the usual elements of damages in actions of this character. Plaintiff was entitled to compensation for the disappointment in her reasonable expectations of pecuniary advantage from marriage with defendant. They could properly consider the injury to her feelings and the mortification and mental suf-

fering which followed the rude breaking up of the long engagement.

The defendant had dissuaded the plaintiff from association with any other man and begged her to remain true to him. Meanwhile the possibility of any other marriage was becoming more remote. The jury were properly instructed that if there was sexual intercourse while there was no promise to marry the plaintiff would not be entitled to recover therefor; but that if the defendant by reason of the promise of marriage was enabled to and did seduce the plaintiff, this seduction might be taken into account in aggravation of damages.

The jury probably believed that the plaintiff was seduced by the defendant by reason of the promise of marriage, and that he used her for the gratification of his passions when opportunity offered for nearly three years; that then without any just cause he discarded her under such circumstances as impaired her social standing and darkened her life.

There was testimony from which the jury might have believed that her repudiation by him was wanton and ruthless and intended to wound her feelings and injure her prospects in life. They may have believed that the allegation in the answer that defendant was debauched by the plaintiff was made in bad faith and utterly without foundation.

Since there was no proof of property owned by the defendant the verdict was undoubtedly a large one, and we should have been better satisfied if it had not exceeded $5,000. But the facts present a case where a large verdict was justifiable. It is well settled that in this class of cases the amount of damages is a subject peculiarly in the province of the jury. On the motion for a new trial the circuit judge declined to reduce the verdict.

We cannot say that in assessing the damages, compensatory or punitive, the jury were influenced by passion or prejudice, or that the discretion of the circuit judge in denying a new trial was not properly exercised.

By the Court.—Judgment affirmed.

IN RE DOOR CREEK DRAINAGE DISTRICT.

September 22—October 19, 1920.

Drains: Benefit accruing to trunk-line highways: Assessment against county: Validity: Enforcement.

1. A county charged with the obligation to maintain trunk highways may be benefited by the drainage of the lands upon which such highways are located, and under sec. 1379—10*b*, Stats. 1919, are subject to the same burdens respecting contributions to pay the cost of establishing a drainage system as are cities, towns, and villages.
2. While a tax is not enforceable as a debt unless provided by the legislature, an order assessing benefits, made in statutory proceedings to establish a drainage district, is the culmination of a judicial proceeding; and an order made assessing benefits against a county may be enforced by any and all processes inherent in courts of justice.
3. In view of the statutes making counties liable for damages caused by defects in trunk-line highways and for the cost of their maintenance in excess of refunds from the state, an assessment of benefits for a drainage system inures to the advantage of the county.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This order, with a slight modification, confirms the final report of the commissioners of the *Door Creek Drainage District* fixing the drainage assessment against *Dane County* for benefits to state trunk highway No. 12.

A petition for the formation of a drainage district to be known as the *Door Creek Drainage District* was filed in the circuit court for Dane county on March 10, 1913. The final report of this commission was filed November 5, 1919, assessing benefits as follows: 105 rods state trunk highway No. 12—assessment of benefits, $2,100; assessment of cost of construction, $1,071.

On December 31, 1919, an order was entered by the court confirming the report of the commissioners, and on March 5, 1920, an order was entered by said court per-

mitting *Dane County* to file its remonstrances against the assessments. A hearing was had before the court without a jury. The court decided that the drainage to be given by the respondent district would result in a saving of $2,100 in the maintenance of the 105 rods of trunk highway No. 12 located within the district, and that by reason of the fact that under the Wisconsin statutes *Dane County* is liable for the maintenance of the portion of the highway thus benefited, such saving would inure to the benefit of *Dane County*. An order was entered assessing *Dane County* this sum as a benefit, from which order the county appeals.

For the appellant there was a brief by *Roman Heilman*, attorney, and *John J. Blaine*, attorney general, *E. E. Brossard*, assistant attorney general, and *Emerson Ela*, of counsel, all of Madison; and the cause was argued orally by *Mr. Heilman* and *Mr. Brossard*.

For the respondent there was a brief by *J. M. Clancey* of Stoughton and *Buell & Lucas* of Madison, and oral argument by *Frank W. Lucas*.

Siebecker, C. J. It is argued that no power had been conferred upon the drainage district by the legislature to make this assessment against the county. The appeal comes up on the record without a bill of exceptions and presents for consideration legal questions arising upon the following facts found by the court: That the part of trunk highway No. 12 here involved has been legally built; that it is within the *Door Creek Drainage District;* that the county is obligated to maintain this part of the trunk highway in the manner provided by the statutes; that all of the land on which this trunk highway is located was separately assessed to the owners for benefits to the full amount by which the value of the land is increased by the proposed drainage for agricultural purposes; that the assessment here attacked is in addition to such assessment for agricultural benefits to the land; and that the proposed drainage will benefit *Dane*

County in its maintenance of this part of trunk highway No. 12 lying within the drainage district. The statutes providing for acceptance of federal aid for the construction and maintenance of a system of improved highways throughout the state are in conformity with the requirements of the federal act and make the system of state highways thus established a state highway system under the direct control of the state highway commission. By statute, maintenance of this highway system lying within each county of the state is imposed on the several counties "in accordance with the directions, specifications, and regulations made for such maintenance by the commission" (sub. 1 (a), sec. 1317, Stats.), and the cost of such maintenance, plus an allowance for use of county machinery, is to be paid into the county treasury out of the state trunk highway appropriation, which consists of all moneys paid into the state treasury by the United States under the federal act, by the several counties for highway purposes, and all sums set aside by the state for the purpose of the net proceeds of automobile licenses. It is apparent from the various provisions of these statutes providing for the construction, improvement, and maintenance of this highway system called the "State Trunk System" that such highways are state highways, and that the counties charged with their construction and maintenance have no rights of ownership to the easement, and that the state employs the counties of the state as its agents to establish and maintain them. The provisions of sec. 1317, Stats., charging counties with maintenance of this highway system, in no way affect or conflict with the provisions of the federal aid act, and hence the state policy of charging the county with this duty must be accepted as proper by the state in carrying out its governmental function. The question then arises, Can a county be deemed to have been benefited by the drainage of lands on which such trunk highways are located, in the light of the obligations so imposed on counties to maintain them? The trial court was persuaded that the evidence

shows that the top grade of the highway in question averages not to exceed two feet above the level of the adjoining marsh, upon which water stands for a considerable period of each year, and that drainage such as is here proposed by the drainage district will reduce the cost of maintenance of the road. This conclusion seems self-evident and must be recognized as a matter of common knowledge in road building. It is apparent that the legislature purposed by the amendment of sub. 5, sec. 1379—18, Stats. 1917, as provided in sec. 1379—10*b*, Stats. 1919, by including "counties" in the definition of "corporation," that counties were to be subjected to the same burdens and duties respecting contributions to pay the cost of establishing a drainage system as are cities, towns, and villages. The trial court clearly expressed the evident legislative object in holding that

"The drainage statute discloses a clear intent to render all corporations, including counties, subject to assessment for benefits conferred by drainage. Such assessment is against the corporation as distinguished from an assessment against land. The mere fact that the statutes prescribe no method by which such assessment is to be collected does not negative the intent to permit the assessment of benefits against counties."

The right to assess benefits against corporations as such for benefits incident to drainage is recognized in the case of *Bryant v. Robbins,* 70 Wis. 258, 35 N. W. 545. It was declared respecting such a charge under the drainage statutes there involved:

"The law authorizes charging a city or town with a part of the expense when such city or town derives a public benefit from the whole or any part of the work. Where the streets or highways of a city or town are particularly benefited by the improvement, there is surely no injustice in charging such city or town with an amount equal to such benefit."

The drainage statute prescribes no method that shall be followed in collecting such an assessment under the drainage

statute. It is urged that this condition of the statute indicates that the legislature did not intend to make the county liable for an assessment of such benefits because the road or easement cannot be subjected to such a tax nor sold to satisfy it, as is the case in other assessments under the drainage statutes. While a tax is not enforceable by judicial proceeding as a debt unless it is so provided by the legislature, it does not necessarily follow that this makes the assessment under the drainage statute unenforceable as a demand against the county. It was observed in the case of *Stone v. Little Yellow D. Dist.* 118 Wis. 388, 95 N. W. 405, that the statutory proceeding for establishing a drainage district and making an assessment of benefits under the statute by an order or decree based upon the facts presented to the court and rendered in the light of the law as the court declares it, "is the culmination of an entirely judicial proceeding," and "that, as a corollary thereof, it may be enforced by the court rendering it by any or all of those processes inherent in courts of justice." And that it "is a judicial one has the support of intimations at least from this court and from the courts of Illinois, whence in very large measure the statutes were adopted" (citing). We perceive no grounds why the court's decree in drainage assessments is not a final determination of the questions presented as above suggested in the *Bryant Case,* nor do we discover any obstacle in the law for its enforcement as a demand against the county. We think the trial court correctly held that

"In the absence of express legislative provision, this obligation of the county will be enforced as other obligations against the county are enforced. The statute does not attempt to give the power to enforce the assessment of benefits by sale of any portion of the trunk-line highway."

As above indicated, the statute imposes on counties the duty of maintaining the trunk-line highways of the state, makes them liable for damages caused by their defective and insufficient condition, and provides for repayment of the

cost incurred by the counties for maintenance by the state, which is dependent on the amount available out of the state highway funds. Such refund to counties is fixed in amount by statute. Should the costs of maintenance exceed such amount of refund, then the county must pay the excess out of its treasury, as it is required to pay the damages caused through its default in keeping the highway in a state of sufficiency out of its treasury. It thus appears that counties are liable for damages caused by defects due to its defaults and for costs of maintenance in excess of refund from the state under the duty imposed on them to maintain these highways, and that such liabilities are not, in the proper sense, liabilities of the state in carrying out the governmental function of establishing this public highway system. It is plain that the assessment of benefits here involved inures to the advantage of the county incident to the obligation imposed upon it to build and maintain this highway. We think it clear, in the light of the statutes charging the county with the maintenance of this highway regardless of being completely reimbursed by the state for the cost thereof, that the drainage district has the power to assess the county for the amount it is benefited in maintaining this highway by the draining of the soil on which it is built as a result of maintaining this drainage system.

By the Court.—The order is affirmed.

CITY OF MILWAUKEE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, imp., Respondent.

September 23—October 19, 1920.

Appeal: Public utilities: Order requiring that complaint be made definite and certain.

In an action to set aside an order of the railroad commission fixing rates, an order requiring the complaint to be made more definite and certain is not appealable under sec. 3069, Stats., notwithstanding sub. (d), sec. 1797—16, providing

that either party, in an action to review a determination of the commission, may appeal to the supreme court within sixty days after the service of a copy of an order or judgment of the circuit court, since said section refers to an order or judgment on the merits.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Dismissed.*

Plaintiff brought an action to set aside an order of the railroad commission fixing street-car fares in Milwaukee, alleging that the rate of fare fixed was unlawful. The *Milwaukee Electric Railway & Light Company,* a defendant, moved the court that plaintiff be required to make its complaint more definite and certain. An order was entered granting the motion, and from such order the plaintiff appealed.

For the appellant there was a brief by *Clifton Williams,* city attorney, and *Joseph L. Bednarek,* assistant city attorney, and oral argument by *Mr. Bednarek.*

For the respondent there was a brief by *Miller, Mack & Fairchild* and *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *George B. Luhman,* all of Milwaukee.

VINJE, J. The defendant company's contention that the order is not appealable under sec. 3069, Stats., is well taken. *State ex rel. Schumacher v. Markham,* 162 Wis. 55, 155 N. W. 917. Plaintiff concedes this, but claims that the order is made appealable by sub. (d), sec. 1797—16, Stats., which provides that "Either party to said action" (namely, an action to set aside an order or judgment of the commission), "within sixty days after service of a copy of the order or judgment of the circuit court, may appeal to the supreme court." It is clear that the order or judgment referred to in the section quoted means an order or judgment on the merits of the action and not a mere interlocutory order relating to practice. That such is the proper construction is made certain by the language of sec. 1797—17, providing that in

such actions the practice and rules of evidence shall be the same as in civil actions except as otherwise provided.

By the Court.—Appeal dismissed.

GUNDLACH, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY and THE DIRECTOR GENERAL OF RAILROADS, Respondents.

September 23—October 19, 1920.

Railroads: Accident at crossing: Clear signal and absence of flagman: Contributory negligence: Question for jury.

1. An instruction as to the contributory negligence of the driver of a wagon, injured at a railroad crossing, that if the circumstances when he approached the crossing were such as to lead the jury to find that he might well have believed that they gave him an affirmative assurance of safety, it was a circumstance to be considered with all other facts in determining whether he exercised the degree of care ordinarily exercised under the same circumstances, but that he was not excused, because of anything in the circumstances surrounding the crossing, from exercising ordinary care to ascertain whether the track was clear,—is correct.
2. In an action for injuries to such driver, whose view of the crossing was obstructed and who relied on the fact that the stop signal was in the place where it customarily was when not in use and upon the further fact that the flagman was not present, the question of the contributory negligence of the driver was for the jury.
3. It is a matter of common knowledge and experience that travelers, approaching a railroad crossing at a time when gates or flagmen are ordinarily maintained there, consider the fact of their presence or absence in determining their course of conduct.
4. Where recovery in an action against a railway company and the federal director general of railroads was for injuries plaintiff suffered while the railway was under federal control, plaintiff's judgment claim is one to be settled and paid pursuant to the provisions of the Transportation Act of 1920 (41 U. S. Stats. at Large, 456, ch. 91), and the agent designated by the President under that act is substituted as defendant in place of the railway company and the federal director general on the motion of the railway company.

APPEAL from a judgment of the circuit court for Dane county. E. RAY STEVENS, Circuit Judge. *Reversed.*

Personal injury. First street, in the city of Madison, extends north and south and crosses the defendant railway company's tracks at a right angle. On each side of the railway the street is paved with concrete to a width of twenty-six feet. There is a slight decline in the highway as it approaches the railway track from the south. On the west side of First street and south of the tracks is a warehouse seventy-eight and one-half feet long east and west, thirty-two and three-tenths wide north and south. The northwest corner of the warehouse is a little over twenty feet from the nearest rail of the main track. There is a spur track between the warehouse and the main line which terminates at the east end of the warehouse. The main track running to the west is practically straight for a distance of 1,500 feet. At the time in question an engine, with the bell ringing, was backing from the yards easterly, traveling at a speed of twelve miles per hour as found by the jury. The collision occurred at 8:15 a. m. on a clear day with the sun shining. The plaintiff was driving a gentle team of horses hitched to a milk wagon and standing or holding on to the east side of the wagon as it proceeded northerly toward the railroad track. As the plaintiff approached the railway track he looked to the west between the south side of the warehouse and adjacent building to see if any train was approaching from the west. He saw nothing. His team continued on toward the railroad track, coming down the slight decline unchecked. He then turned his attention to the east, where his view was partially obstructed, and endeavored to ascertain if any train was coming from the east. When 100 feet from the crossing he observed that the flagman, who at that time of day was usually and ordinarily at the crossing to warn travelers on the highway of approaching trains, was not in the position he took to give such warning; that the stop sign was in the place usually occupied by it when not in use by

the flagman. He then looked to the west and discovered the engine almost upon him and endeavored to cross the track, and the rear end of the wagon was struck by the engine, thrown around and demolished, and the plaintiff sustained severe injuries.

This action is brought to recover damages sustained by the plaintiff to his person and property. There was a special verdict. The jury found, first, that the engine while approaching the crossing and within twenty rods of the street where the collision occurred was traveling at the rate of twelve miles per hour; second, that the injury to the plaintiff was not the natural and probable result of the conduct of those in charge of the engine; third, that those in charge of the engine, acting as persons of ordinary intelligence and prudence, ought not to have foreseen that an injury to a traveler would probably occur as the result of their conduct; fourth, that those in charge of the engine, at and just prior to the time the engine struck the wagon, failed to exercise ordinary care; fifth, that the damage sustained was the natural and probable result of such want of care of those in charge of the engine; sixth, that those in charge of the engine, in the exercise of ordinary care, should have foreseen that an injury to a traveler might probably result from their conduct; seventh, that the plaintiff did not fail to exercise ordinary care. Damages for injury to the person were assessed at $4,700 and for injury to the property at $500. Other questions were answered which are not material on this appeal. The defendants moved for a new trial and to set aside the verdict, and the trial court held the plaintiff guilty of contributory negligence as a matter of law, changed the answers to questions 7, 8, 9, and 10 in accordance with such finding, and upon the verdict so amended defendants had judgment, from which the plaintiff appeals.

For the appellant there was a brief by *Crownhart & Wylie* of Madison, and oral argument by *Fred M. Wylie*.

R. N. Van Doren of Milwaukee, for the respondents.

ROSENBERRY, J. Upon this appeal the negligence of the defendants is conceded. This renders unnecessary a determination as to whether or not the defendants were guilty of negligence in failing to maintain a flagman at this point and we will not discuss that question.

The principal question presented here is, Did the trial court err in holding that the plaintiff was guilty of contributory negligence as a matter of law and in setting aside the finding of the jury upon that question? In submitting to the jury the question of whether or not the plaintiff was guilty of contributory negligence, the trial court correctly instructed the jury as follows:

"If the circumstances surrounding the crossing when *Mr. Gundlach* [plaintiff] approached this crossing were such as to lead you to find that *Mr. Gundlach* might well believe that those circumstances gave him an affirmative assurance of safety, that is a circumstance to be considered by you in connection with all the other facts and circumstances in the case in determining whether *Mr. Gundlach* exercised the degree of care which the great mass of mankind of like age, experience, and intelligence ordinarily exercise under the same or similar circumstances; but you must keep in mind the fact that nothing in the circumstances surrounding this crossing at the time *Mr. Gundlach* approached the crossing will excuse him from exercising ordinary care in using his senses of sight and hearing in order to ascertain for himself whether the track was clear before entering upon it."

On behalf of the defendants it is argued that because it appears from the evidence that when the plaintiff was thirty-five feet from the crossing he could see down the track to the west 111 feet (looking by the north side of the warehouse at the very first opportunity), and when thirty feet from the crossing he could see 164 feet to the west, the jury having fixed the speed of the engine at twelve miles per hour with the plaintiff's team traveling four miles per hour, that when the plaintiff was thirty feet from the track the engine must have been 130 feet from the crossing and therefore in plain view of the plaintiff at that point, that he did

not look to the west at that point, and that he was therefore not in the exercise of ordinary care and did not use his senses of sight and hearing, and that to disturb the holding of the trial court that the plaintiff was guilty of contributory negligence as a matter of law would overrule a long line of Wisconsin cases, citing *White v. C. & N. W. R. Co.* 102 Wis. 489, 78 N. W. 585; *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148; *Brown v. C. & N. W. R. Co.* 109 Wis. 384, 85 N. W. 271; *Jacky v. McAdoo, ante,* p. 262, 177 N. W. 885; *Hains v. Johnson,* 154 Wis. 648, 143 N. W. 653; and other cases. In *White v. C. & N. W. R. Co.* it appears that a foot passenger upon the highway approached a crossing at which gates were ordinarily maintained, that there was nothing to distract his attention or prevent him from using his senses, and he testified that he looked but saw no train and heard no bell when at a point within a zone of safety, it appearing conclusively that had he looked or listened he would have seen the engine or heard the bell, and his failure to do so was held to be heedless and reckless conduct. It is there said: "The duty to look and listen is absolute, and nonobservance of that duty is negligence *per se.*" The case of *Rohde v. C. & N. W. R. Co.* 86 Wis. 309, 56 N. W. 872, wherein it is said, "the open gate was an assurance to the public that there was no danger, and an invitation to cross in safety," was commented upon, and it was said:

"The paramount duty of the traveler is to use ordinary care, and this obligation is none the less absolute even though the other party is guilty of negligence. It is only when the traveler is lulled into security in reliance upon the negligent act, and is drawn into danger that he could not avoid by the exercise of ordinary care, that the obligation to respond in damages exists."

We are not disposed to depart from the rule established by these cases. Travelers in approaching a highway do not act with mathematical precision and are held to no higher

degree of care than that exercised by the great mass of mankind under the same or similar circumstances. While the plaintiff in this case might not rely upon the fact that the warning sign was in the customary place when it was not in use, and upon the further fact that the flagman was not present, as an absolute assurance of safety and proceed without regard to his own safety, such circumstances are nevertheless factors to be considered in determining whether or not the plaintiff was at the time in the exercise of ordinary care. He looked before he passed the south side of the warehouse, and had the approaching engine been of the ordinary length of a train he undoubtedly would have seen it. When 100 feet from the crossing he saw that the flagman was absent and the signal in place and the crossing exactly as it ordinarily was when no train was approaching. He then turned his attention to the east, trains being as likely to come from the east as from the west. His view being obstructed, he satisfied himself no train was approaching from the east, and then again looked to the west but too late to avoid the collision. While a man may not rely upon reason, and fail to exercise his senses of sight and hearing in the presence of a known danger, yet, in determining whether or not he is guilty of a want of ordinary care, all the circumstances must be considered. This is not the case of a traveler approaching a railway crossing without exercising any care or in a heedless and careless manner. The evidence establishes the fact that he was in the exercise of some degree of care, and we are of the opinion that it is a question for the jury to determine whether or not, in the face of all the circumstances, including the fact that the gateman was not in sight, that the signal was in place where it customarily was when not in use, the conduct of the plaintiff in approaching the crossing constituted the use of such care as is ordinarily exercised by the great mass of mankind under like circumstances. *Derr v. C., M. & St. P. R. Co.* 163 Wis. 234, 157 N. W. 753. We are of the opinion that this rule

does not modify the rule announced in *White v. C. & N. W. R. Co., supra,* and gives effect to *Rohde v. C. & N. W. R. Co., supra.* It is a matter of common knowledge and experience that travelers approaching a railway crossing at a time when gates or flagmen are ordinarily or usually maintained, take into consideration that fact in determining their course of conduct, and it is for the jury to determine whether or not, in a particular case, a traveler has given that circumstance such weight and consideration as the great mass of mankind ordinarily do under such circumstances, except in cases where it clearly appears that the traveler has approached the crossing in a careless and heedless manner without the proper regard for his own safety, as in the *White Case.* Nor does this excuse the traveler from exercising a higher degree of caution in approaching a crossing where the view is obstructed than where it is clear. Neither does it necessarily follow that because there is ordinarily a flagman or gate maintained at a crossing where an injury occurs that in all cases a jury issue is raised. Each case must depend upon its own facts.

We think the contention of the defendant *Chicago & Northwestern Railway Company,* that it is not a proper party, is ruled by *Franke v. C. & N. W. R. Co.* 170 Wis. 71, 173 N. W. 701.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment upon the verdict as rendered by the jury.

The following opinion was filed December 2, 1920:

Per Curiam. The defendants' motion to substitute "John Barton Payne, agent designated by the President under the 'Transportation Act of 1920'" (41 U. S. Stats. at Large, 456, ch. 91), is presented for the purpose of having the judgment in this action satisfied and paid out of the funds appropriated by Congress under this "Transportation

Act of 1920." The recovery in this case was for injuries the plaintiff suffered while the railway company was under federal control under the act of Congress providing for the operation of transportation systems, and hence the judgment claim is one to be settled and paid pursuant to the provisions of the "Transportation Act of 1920." The plaintiff insists that any right he has against the defendant railway company for satisfaction and payment of this judgment shall be preserved to him. We do not regard that this motion necessarily demands determination of his rights in this respect, and therefore decline to pass judgment on his right of satisfaction of this judgment against the *Chicago & Northwestern Railway Company*. It is manifest that the judgment is a proper claim to be paid and settled out of the funds appropriated under the provisions of the "Transportation Act of 1920." It therefore seems appropriate that "John Barton Payne, agent for the United States Railroad Administration," be substituted as the defendant in place of the above named defendants and respondents and that the mandate heretofore entered in this court be amended.

The mandate heretofore entered in this action in this court is hereby amended to read as follows:

Judgment reversed, and the cause remanded to the circuit court for Dane county with directions to substitute "John Barton Payne, agent designated by the President under the 'Transportation Act of 1920,' " as sole defendant and to enter judgment upon the verdict rendered by the jury in favor of the plaintiff against the defendant. No costs allowed to either party on motion.

CURTIS & YALE COMPANY, Respondent, vs. WUNDERLICH, Appellant.

September 23—October 19, 1920.

Guaranty: Construction: Past or future transactions.

1. A guaranty by the president of a lumber company, running to a manufacturer of building materials and woodwork, of the lumber company's account, both book and notes, made in June, 1915, is *held,* under the course of dealing between the manufacturer and the lumber company, to have covered only transactions occurring up to November 20, 1915, when the account was closed and settled, and not to render the guarantor president liable for indebtedness of the lumber company to the plaintiff incurred in 1916 and 1917.
2. A guaranty will be construed to be prospective rather than retrospective unless it clearly appears that the parties intended it to cover past transactions.

APPEAL from a judgment of the circuit court for Langlade county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

Action to recover on an alleged guaranty. Judgment for the plaintiff, and defendant appealed.

For the appellant there was a brief by *Avery & Plantz* of Antigo, and oral argument by *Charles H. Avery.*

For the respondent there was a brief by *Bird, Okoneski & Puchner* of Wausau, and oral argument by *R. A. Puchner.*

OWEN, J. Plaintiff is engaged in the manufacture and sale of building materials and wood-work at Wausau, Wisconsin. During the years 1914 and 1917, inclusive, it sold a considerable quantity of its product to the C. H. Krause Lumber Company, at Antigo, upon account. The defendant, *George H. Wunderlich,* during such time was the president and principal stockholder of the lumber company, although he took little part in the management of its affairs. April 6, 1915, the plaintiff wrote to the Krause Lumber Company as follows:

"A year or so ago we handled some of your paper with

the indorsement of *Mr. George H. Wunderlich,* this precaution being taken simply as a matter of good business. With all conditions as they are at present, we now feel that it would be quite proper for you to give us the personal guaranty of *Mr. Wunderlich* covering such notes and open accounts as you will be having for the next few months, limiting the total amount if you feel that this would be necessary and proper."

An exchange of correspondence resulted from this suggestion which culminated in the following letter written by the defendant to the plaintiff under date of June 15, 1915, upon which plaintiff bases its cause of action:

"*Curtis & Yale Co.,* Wausau, Wis.

"Gentlemen: Regarding the C. H. Krause Lumber Company account, I personally guarantee their account, both book and notes, to you.

"Yours very truly, GEO. H. WUNDERLICH."

It appears that the course of dealing between the plaintiff and the lumber company was confined to the spring, summer, and fall months, and that the account was practically inactive during the winter months, for the reason that very little building was going on during the winter season. For instance, there was no charge made by the plaintiff against the lumber company between November 20, 1915, and March 20, 1916, and this was usual throughout the years of their business relations.

On December 23, 1915, plaintiff's book account against the lumber company was balanced and settled by the lumber company giving two notes aggregating $700, and the first charge thereafter made by plaintiff against the lumber company was March 20, 1916. Plaintiff continued to furnish its product to the lumber company during the seasons of building activity up to the month of December, 1917. December 18, 1917, the lumber company was adjudicated bankrupt. Plaintiff filed its claim in the bankruptcy court, dividends were paid thereon, and this action was brought to recover the balance unpaid after crediting such dividends. It is not

contended that any part of the $700 notes given to balance the account of December 23, 1915, is included in the account.

The trial court construed the letter of June 15th, above set forth, as an unlimited guaranty as to either time or amount and held the defendant liable thereon for all merchandise furnished the lumber company down to the time of its bankruptcy. Appellant contends that this was an erroneous construction of the liability assumed by *Mr. Wunderlich,* and the ruling of the court in such respect is the sole question presented on this appeal.

We have in mind the principle that "guarantees will be construed to be prospective rather than retrospective, unless it clearly appears that the parties intended that they should cover past transactions." *First State Bank v. Boetcher,* 154 Wis. 444, 447, 143 N. W. 172. The plaintiff invokes this rule of construction and contends that, applying it to the letter of June 15, 1915, the ruling of the trial court must be sustained. We think otherwise. The plain language of the guaranty, so called, strongly suggests the existence of a then present account, which *Mr. Wunderlich* assumed to guarantee, and rather excludes the idea that he intended to guarantee future accounts. The language "regarding the C. H. Krause Lumber Company account" suggests a then existing indebtedness, as does the further language, "I personally guarantee their account, both book and notes, to you." The view most favorable to the plaintiff that can be taken of this language is that it is ambiguous and that the intention of *Mr. Wunderlich* with reference to guaranteeing future accounts is doubtful. This situation justifies a reference to the entire correspondence between the parties leading up to the writing of the letter of June 15th. When we refer to that, we see that in its initial communication the plaintiff suggested that it be furnished with the personal guaranty of *Mr. Wunderlich* covering such notes and open account "as you will be having for the next few months." Considering the course of business between the parties, it is plain that the term "the next few months" had reference to the season of

1915, which, as we have seen, so far as business transactions between the plaintiff and the lumber company were concerned, ended November 20th. Owing to the cessation of building operations the lumber company had no use for the product of the plaintiff during the winter months, and there was a lapse of the account from November 20th to March 20th, during which time a balance was struck and the account was settled. We think it clear that the intention of the plaintiff in asking and that of the defendant in executing the guaranty was that it should cover only such transactions as occurred during the months of 1915, from which it follows that the defendant is not liable for indebtedness arising subsequent thereto. The complaint of the plaintiff should therefore be dismissed.

By the Court.—Judgment reversed, and cause remanded with instructions to dismiss the plaintiff's complaint.

W. C. ZACHOW COMPANY, Respondent, vs. GRIGNON and another, Appellants, and others, Respondents.

September 23—October 19, 1920.

Novation: Burden of proof: Corporations: Power of president to effect a novation: Personal advantage to president: Statute of frauds: Promise to pay debt in particular manner.

1. Where defendants claim they were released from an obligation and that another debtor was accepted in their stead, they have the burden of proving these facts.
2. Evidence showing that the president of a corporation had done business with the defendants at various times, that their dealings with the corporation had been through him, that he had taken orders for the corporation, and that he had promised to release the defendants from a debt and accept other debtors, is *held* not to establish a novation where there was no evidence that the president claimed to act for the corporation in making a substitution of debtors and the only direct evidence in the case is that he had no power to make such a substitution.

3. It is not within the ordinary scope of corporate business for the president to release debtors by substituting his own obligation or that of a partnership of which he is a member; and in this case the act of the president in substituting his own obligation for that of certain debtors of the corporation is *held* too clearly antagonistic to the interests of the corporation to be upheld.
4. Though a promise may be in form to pay the debt of another, if it is founded upon a new and valuable consideration moving from the creditor and promisee to the promisor and is beneficial to the latter it is not within the statute of frauds.

Appeal from a judgment of the circuit court for Shawano county: Oscar M. Fritz, Judge. *Reversed.*

The action was brought by plaintiff against *Grignon* and *Milles* to recover a balance claimed to be due for supplies furnished them for use in logging operations conducted by them for defendants *Zachow* and *Rogers.*

The action was originally brought by plaintiff against defendants *Grignon* and *Milles,* and they set up that in the latter part of 1913 there had been a settlement between the plaintiff, acting through *W. C. Zachow,* and the defendants, in which it was agreed that certain accounts and claims which defendants had against *W. C. Zachow* and the partnership of which he was a member should be accepted by the plaintiff in full satisfaction of plaintiff's claim.

There was a special verdict in the first trial in which the jury found that there was an agreement by which defendants *Grignon* and *Milles* were to be released, and that *W. C. Zachow* acted as agent for the *W. C. Zachow Company,* the plaintiff. The court thereupon set aside this verdict, denying defendants' motion for judgment, and ordered that *Zachow* and *Rogers,* the partners, be brought in as defendants and that a new trial be had. The court held in that proceeding that the testimony did not constitute a novation. Accordingly an amended answer was filed setting up an agreement between the defendants *Grignon* and *Milles* and the plaintiff, *Zachow Company,* acting through its president, *Zachow,* and the copartnership *Zachow* and *Rogers,* acting through

defendant *Zachow*, that the accounts between defendants *Grignon* and *Milles* and defendants *Zachow* and *Rogers* should be settled by allowing to *Grignon* and *Milles* as the balance due on their logging contract the amount of plaintiff's claim against *Grignon* and *Milles* for said supplies, and that the plaintiff accepted the account of *Grignon* and *Milles* against defendants *Zachow* and *Rogers* in place of and in payment of plaintiff's account against *Grignon* and *Milles*, and that *Zachow* and *Rogers* assumed payment of said account. Defendants also alleged that plaintiff should be estopped from questioning the authority of *Zachow* by reason of its long acquiescence.

Defendants filed a cross-complaint against *Zachow* and *Rogers* for services in conducting logging operations, and also alleged an agreement on their part to assume and pay the plaintiff its claim against defendants. That defendants *Zachow* and *Rogers* failed to make said payments.

The defendants *Zachow* and *Rogers* denied any such agreement. It appeared that *Zachow* was president of the *Zachow Company*, owned two thirds of the stock, and was also a director; that Mr. Kuhl was manager; and that the president sometimes took orders for supplies to be sold.

The appellants always made arrangements with *Zachow* when they bought supplies of the company and had dealt with him for a good many years. Appellants were loggers of what is known as "blown-down timber" on the Menomonee reservation, and they obtained necessary supplies from plaintiff's store. *Zachow* was also one of the partners of *Zachow* and *Rogers*. In the fall of 1912 *Zachow*, acting for *Zachow* and *Rogers*, made a contract with *Grignon* and *Milles* to do logging for the partnership. No written contract was ever made. The agreement was not entirely definite as to the prices, especially as to one class of timber called "mining timber." After the operations had been going on some time the defendants received a statement from the *Zachow Company* of the account for supplies.

The plaintiff corporation carried on a store at Cecil. *Zachow* lived at Shawano, ten miles away. *Zachow* and *Rogers* carried on a business at Newald, ninety miles from Shawano. *Rogers* resided at Newald, and the timber cut by plaintiff was near Newald. The testimony was that after receiving the statement the defendants went to Shawano and told *Zachow* that they had received the statement and urged him to get their logging matters straightened up. He told them he would fix up the account at the store and call it square, to which they agreed. Later they received another letter from plaintiff and again went to *Zachow*. He said he would fix it up as he had agreed to. These interviews were repeated several times. Defendants' testimony was to the effect that they had always dealt with *Zachow* in getting supplies.

Zachow denied that he had agreed that *Grignon* and *Milles* should be allowed an amount for putting in the timber to balance the account of the *Zachow Company*, but said he would see the *Zachow Company* and see that they would not make *Grignon* and *Milles* any trouble with that account until they got the regular credit of *Zachow* and *Rogers*. *Rogers* testified that he never had any talks with his partner, *Zachow*, with respect to taking care of the account and had given him no authority to make the arrangement which the defendants claimed.

The question of the substitution of *Zachow* and *Rogers* in place of *Grignon* and *Milles* was never brought to the attention of the board of directors of the *Zachow Company*, and it was testified that no authority had been given *Zachow* by the corporation or its directors to substitute *Zachow* and *Rogers* in place of *Grignon* and *Milles*.

Zachow and *Rogers* moved for a directed verdict on the ground that no novation had been shown, that the alleged agreement was within the statute of frauds, and that no authority had been given to *Zachow* to consent to a novation. Plaintiff also moved for a directed verdict in its favor on similar grounds.

The court directed a verdict in favor of plaintiff against *Grignon* and *Milles,* holding that the testimony would not admit of a finding that the partnership promised to pay the indebtedness of *Grignon* and *Milles* to plaintiff, and also on the ground that there was no sufficient evidence for a finding that the plaintiff had consented to a novation. That if there was an oral promise by *Zachow* to pay the *Grignon* and *Milles* indebtedness to the *Zachow Company,* it would not be enforceable as between *Zachow* and *Grignon* and *Milles* because of the statute of frauds.

The cross-complaint of *Grignon* and *Milles* was also dismissed.

For the appellants there was a brief by *Eberlein & Larson* of Shawano, and oral argument by *A. S. Larson.*

For the respondent *W. C. Zachow Company* the cause was submitted on the brief of *P. J. Winter* of Shawano, and for the respondents *Zachow* and *Rogers* on that of *A. M. Andrews* of Shawano.

JONES, J. The indebtedness of the defendants *Grignon* and *Milles* to plaintiff, the *Zachow Company,* seems not to have been denied. But it was claimed that it had been released by a mutual agreement by which plaintiff was to release the defendants *Grignon* and *Milles* and to accept as a debtor in their stead the copartnership of *Zachow* and *Rogers.* Of course the burden rested on those raising this defense to prove it. They sought to do so by proof that the president of the plaintiff corporation had done business with them at various times, that he had taken orders for the corporation, that their business transactions with the corporation had been carried on through him, and that he had promised to make the substitution relied on.

The testimony does not show that in this transaction he claimed to act for the corporation, and the only direct testimony on the subject is that he had no authority to substitute *Zachow* and *Rogers* in place of *Grignon* and *Milles.* To sustain their contention appellants rely on such decisions

of this court as *Garrick T. Co. v. Gimbel Bros.* 158 Wis. 649, 149 N. W. 385; *Milwaukee T. Co. v. Van Valkenburgh,* 132 Wis. 638, 112 N. W. 1083; *St. Clair v. Rutledge,* 115 Wis. 583, 92 N. W. 234; *Figge v. Bergenthal,* 130 Wis. 594, 109 N. W. 581, 110 N. W. 798. But these were cases where the acts of the president of the corporation were far more nearly within the line of the ordinary corporate business or where the officer had been given extraordinary powers the exercise of which it would be inequitable to repudiate.

In our judgment the evidence entirely fails to bring this case within the line of the cases cited. It is very clearly not within the ordinary scope of corporate business for the president to release debtors and substitute for the indebtedness his own obligation or that of a partnership of which he is a member. While there is no evidence of any intentional breach of duty in this case, we cannot consent to establish a precedent under cover of which the grossest frauds might be practiced by transactions in which corporate officers might seek to secure personal advantage at the expense of stockholders. Unfortunately such advantage is too often taken when officers follow the letter of the law and where stockholders and the courts are helpless.

In the present case the contract alleged to have been made by the president was too clearly antagonistic to the interests of the corporation to be upheld. In numerous decisions this court has condemned contracts or transactions in which officers sought to serve their own interest at the expense of the stockholders. In a recent decision, where the conflict in interest seemed far more remote than in the present case, this court said:

"The directors of a corporation are not permitted to use their position of trust and confidence to further their private interests, nor to become parties to contracts concerning corporate affairs intrusted to their management which conflict with a free and impartial discharge of their duties toward the stockholders. Any participation by them in contracts

dealing with matters of corporate interest which is antagonistic to their free and impartial discharge of official duties is denounced by the law, unless all of the stockholders with full knowledge assent thereto." *Timme v. Kopmeier,* 162 Wis. 571, 575, 156 N. W. 961.

See, also, *Miley v. Heaney,* 168 Wis. 58, 169 N. W. 64; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342; *Meating v. Tigerton L. Co.* 113 Wis. 379, 89 N. W. 152; *Hiawatha I. Co. v. John Strange P. Co.* 106 Wis. 111, 116, 81 N. W. 1034; *Haywood v. Lincoln L. Co.* 64 Wis. 639, 647, 26 N. W. 184.

In the cross-complaint against *Zachow* and *Rogers* the defendants alleged as follows:

"That some time during the fall of 1913 or spring of 1914, the exact date of which these defendants are unable to state, it was agreed between these defendants and the said defendants, *Zachow* and *Rogers,* that in payment and settlement of the balance due these defendants, *Grignon* and *Milles,* from the said defendants, *Zachow* and *Rogers,* on account of said logging operations, the said defendants, *Zachow* and *Rogers,* would assume and pay to the plaintiff herein the amount of its claim against these defendants, which said claim had been incurred in connection with said logging operations, and these defendants agreed to accept the assumption and the payment of said account by the said *Zachow* and *Rogers* in settlement of their said claim against them growing out of said logging operations."

There remains the question whether the judgment dismissing the cross-complaint against *Zachow* and *Rogers* should be sustained.

In his opinion the circuit judge used language which seems to hold that the alleged oral agreement made by *Zachow* was a promise to pay the debt of another and void under the statute of frauds, although in the brief of respondent *Zachow Company* it is claimed that this was not the holding of the court.

In the brief of the appellants it is requested that, if this court should reach the conclusion that the plaintiff is entitled to judgment against them, final judgment be deferred

pending a new trial in order that appellants may in the same judgment recover against *Zachow* and *Rogers* on their cross-complaint in the event that they should prevail on a new trial.

It is the claim of appellants that the promise on which they rely is not repugnant to the statute of frauds because it was not a promise to pay the debt of another, but the promise of *Zachow* and *Rogers* for a valuable consideration to pay their own debt in a particular manner. It is well settled that such a promise is not an undertaking within the statute. Said Dixon, C. J., in *Dyer v. Gibson,* 16 Wis. 557, 583:

"We cannot discuss the question whether the promise of one person, though in form to answer for the still subsisting debt of another, if founded upon a new and sufficient consideration moving from the creditor and promisee to the promisor, and beneficial to the latter, is within the statute of frauds and therefore void unless it be in writing, expressing the consideration, and subscribed by the party making it. Decision has multiplied upon decision, with scarce a syllable of conflict, for more than a century, that such a promise is not reached by the statute; and it is now too late for discussion." *Fosha v. O'Donnell,* 120 Wis. 336, 97 N. W. 924.

We have come to the conclusion that the judgment for the plaintiff against the appellants should be affirmed, but that the part of the judgment dismissing the cross-complaint should be reversed, and that the appellants should be allowed in this action to prosecute their claim against *Zachow* and *Rogers;* but it does not seem necessary that the entry of judgment in behalf of the plaintiff should be delayed.

By the Court.—Judgment reversed. The cause is remanded for further proceedings in accordance with this opinion. Costs in this court should be taxed in favor of the plaintiff against defendants *Grignon* and *Milles,* and in favor of *Grignon* and *Milles* as against *Zachow* and *Rogers.*

WILL OF MARVIN.

September 24—October 19, 1920.

Wills: Cancellation with intent to make new will: Effect of failure of new disposition.

1. If a testator cancels or destroys a will with the present intention of making a new disposition of his property, and the proposed new disposition fails to be carried into effect, the presumption in favor of a revocation by the canceling is repelled, and the will stands as originally made.
2. Where testatrix left all her property to one of four grandchildren, and after her death the will was found to have pencil marks through the words bequeathing the property to such grandchild, and below the attestation clause there was written with a pen a clause in the handwriting of the testatrix giving all her property, after payment of all her debts, to an orphans' home, but such clause was not signed by testatrix nor witnessed, the attempted changes did not become effective and the will remained as originally drawn.

APPEAL from a judgment of the county court of Barron county: A. F. WRIGHT, Judge. *Affirmed.*

This is a proceeding to establish a purported last will of Ella Marvin, deceased.

Mrs. Marvin was sixty-six years of age at the time of her death, May 8, 1919, at her home in Barron county. She was survived by four grandchildren, her only heirs at law. Her will, as originally drawn, left all of her property to *Earl Johnson,* one of these grandchildren. After Mrs. Marvin's death her will was found in her home with pencil marks drawn through the words by which the property was given to *Earl Johnson.* Below the attestation clause there was written with a pen the following words in the handwriting of the deceased: "I, Ella Marvin, give all that I have left after paying all debts to the Orphan's Home." There were no witnesses to the bequest set forth in this clause. The body of the will was in typewriting.

The executor of this will applied for probate thereof and

guardians *ad litem* were appointed for the grandchildren. The guardian *ad litem* of the three grandchildren not mentioned in the will contended in the county court that the pencil marks drawn through the name of *Earl Johnson* and the words by which the property was given to him were made there by the testatrix after execution of the will with the intention of revoking the bequest to *Earl Johnson.* Rowena Bairnhart, a sister of the deceased, testified to the effect that the will had always been in the possession of the deceased and was found with the cancellation marks on it after her death; also that the testatrix had expressed intention of revoking the bequest to *Earl Johnson.*

The case was tried before the court. The court found that the cancellation marks did not revoke the will or any part thereof and that the will as originally executed is the will of the testatrix. Judgment was entered allowing the will as originally drawn. This is an appeal from such judgment.

For the appellant the cause was submitted on the brief of *Coe Brothers* of Barron.

For the respondents there was a brief signed by *Charles A. Taylor,* guardian *ad litem* for *Earl Johnson,* and *J. W. Soderberg,* attorney for *T. J. Thompson,* executor, both of Barron.

Siebecker, C. J. The county court found the necessary facts as to residence and death of testatrix to give jurisdiction of this proceeding, also that the paper propounded as the last will was properly executed on the date it bears as Mrs. Marvin's last will. The contest arises on the issue whether or not the first paragraph of the proposed will was revoked by the testatrix. By the second paragraph she declares that she intentionally omits to make any testamentary provision for her other grandchildren. The clause written in ink beneath the attestation clause is not signed by testatrix, nor is it witnessed. An inspection of the face of the

will presents the question, Did the testatrix revoke the first paragraph unconditionally, or did she cancel the first paragraph with the intention of changing the testamentary bequest of her property from *Earl Johnson* to the Orphan's Home mentioned in the pen-written clause at the foot of the witnesses' signatures to the attestation clause? From the facts appearing on the face of the instrument showing these changes of the original will, the natural and probable inference is that at the time of the crossing out of the words in the first paragraph Mrs. Marvin had in mind such a change in making a testamentary disposition of her property. There is nothing to indicate in the changes evidenced by crossing the words of the first paragraph with a lead pencil and the written clause beneath the witnesses' signature in ink that they were made at different times, to support the claim that she first and separately and absolutely revoked the first clause of the will and thereby left a writing in the form of a will without disposing of her property. The fact that she deliberately made the original will and left the writing in the form it was in when she died, indicates pretty clearly that she at all times from the date of the making of the will intended to dispose of her property by this will. The parol proof received by the court tends to support the conclusion that from the date of the making of this will up to her death she believed she had a will. The rational conclusion is that the testatrix entertained the belief that canceling the first paragraph of the will as she did and writing the clause in ink below the will as originally made, operated to change her testamentary bequest from *Earl Johnson* to the Orphan's Home. These attempted changes failed, however, of efficacy. It is a well established rule that if a testator cancels or destroys a will with a present intention of making another and new disposition of his property or a part thereof, and the proposed new disposition fails to be carried into effect, the presumption in favor of a revocation by the canceling is repelled and the will

stands as originally made. Since, then, it is reasonably clear that the testatrix attempted to revoke her testamentary gift to *Earl Johnson* and instead thereof bequeathed her property to the Orphan's Home, which later bequest failed for want of meeting the legal requirements, the original will stands as her testamentary disposition of her estate upon the principle that her attempted cancellation of the first clause

"is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property." 1 Jarman, Wills (2d ed.) 185; 40 Cyc. 1188; *Gardiner v. Gardiner*, 65 N. H. 230, 19 Atl. 651; *Penniman's Will*, 20 Minn. 245; *Knapen's Will*, 75 Vt. 146, 53 Atl. 1003.

It follows that the attempted changes by the testatrix did not become effective, and her will as originally drawn was properly probated by the county court.

By the Court.—The judgment is affirmed.

SLOWIKOWSKI, Appellant, vs. SLOWIKOWSKI, Respondent.

September 24—October 19, 1920.

Divorce: Final division of estate: Property derived from husband: Appointment of trustee.

1. Under sec. 2364, Stats., a judgment in an action for divorce brought by the wife which divested her of title to a vacant lot and gave it to the husband and which required him to pay to the wife $1,400 in cash, is not inequitable, the total property accumulated by the joint efforts of the parties being about $3,640 and the wife having derived the vacant lot from the husband.
2. Under sec. 2368, Stats., it is discretionary with the court whether or not to appoint a trustee to receive any money adjudged the plaintiff wife, and an order appointing a trustee will not be disturbed on appeal except for abuse of discretion.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Affirmed.*

Action for divorce. Plaintiff was granted a decree, and a final division of the property of the parties was made and a trustee appointed to manage plaintiff's share. She appealed from that part of the judgment dividing the property and appointing a trustee.

For the appellant there was a brief by *Pickering & Rieser* of Superior, and oral argument by *R. M. Rieser.*

For the respondent the cause was submitted on the brief of *D. E. Roberts* of Superior.

VINJE, J. It appears from the evidence that the parties had been married some thirty-six years and that before this action was begun she had begun another divorce action. The first action was settled by his deeding to her a vacant lot of the value of about $700. The parties belonged to the working class and all the property owned by them had been acquired by their joint labor since they were married. In addition to the vacant lot defendant owned a farm worth $1,140 and the house and lot in which they lived, worth about $1,800, their total property being of the value of about $3,640 as the court might well find from the evidence. The court divested plaintiff of the title to the vacant lot and gave it to defendant and required him to pay plaintiff $1,400 in cash. She claims she could not be deprived of her own property—the vacant lot—and that the allowance made was inadequate. Sec. 2364, Stats. 1919, provides that "the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband." This vacant lot was derived from the husband. The reason for its derivation is immaterial. It might have been a pure gift or made in settlement of the former suit as in this case. It was none the less property derived from the hus-

band. In a case where a wife purchases real estate from her husband and pays for it out of her separate estate a different rule may apply. That we do not decide. But even if the vacant lot should be considered hers we cannot set aside the division made, for then the husband would own property of the value of $2,940 out of which the wife received $700, or nearly one fourth; or perhaps more than one fourth, as he was required to pay the costs of the suit. So in either view of the case the judgment as to the division of the property cannot be reversed as inequitable.

Sec. 2368 provides that the court "may also appoint a trustee, when deemed expedient, to receive any money adjudged to the wife upon trust." The trial judge saw the plaintiff upon the stand and could judge from such inspection and testimony whether the appointment of a trustee for her was expedient. Suffice it to say nothing is disclosed in the record to warrant this court in disturbing the discretionary act complained of.

By the Court.—Judgment affirmed.

GOLDMAN and others, Appellants, vs. COSGROVE, imp., Respondent.

September 24—October 19, 1920.

Joint adventurers: Organizers of syndicate: Duty of members to make full disclosure: Good faith: Secret profits: Undisclosed commission: Liability: Remedies: Parties to action: Judgment: Accounting and money damages: Joint tortfeasors.

1. When one becomes a member of a group united to prosecute a common enterprise such as the purchase of property, each member owes to every other member the duty of fair, open, and honest disclosure, and no member can, by connivance, deceit, or suppression of facts within the right or to the advantage of any other member to know, procure or accept secret profits, commissions, or rebates to the disadvantage of the others; and he holds gains acquired by his breach of

faith for the common benefit of his associates in proportion to their respective interests. A violation of his duty constitutes actionable fraud, and the usual remedies for the redress of fraud are available.

2. Where defendants, seeking to interest plaintiffs and others in the acquisition of an oil property, not only suppressed the fact that there was a $50,000 secret profit to them, but positively represented that the only commission on the purchase was one of $10,000, which the owner was paying to two of them and which they were reinvesting in the property, co-investors can recover for such fraud, the defendants being charged with the duty of full and fair disclosure of all material and important facts.
3. Where defendants learned that an owner of oil property would take $150,000 for his property, and, acting on the information, endeavored to make a sale for $200,000 to a syndicate organized by them, in forming the syndicate and becoming investors the duty they assumed towards their co-investors would prevent their securing a secret profit.
4. A defendant who knew that two of his associates were making a secret profit in an enterprise they were promoting, and, assuming he would participate in such profit, endeavored to secure other investors to whom he represented that every one was coming in on an equal basis, and who later received a share of the profit, must account therefor in an action by his co-investors. Where it appeared that such defendant had put it out of his power to convey the larger part of his interest, unlawfully acquired, a money judgment will be entered against him as a joint tortfeasor for the entire amount of the secret profit.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

This is an action brought by the plaintiffs to recover from the defendants the amount of a secret profit alleged to have been made by the defendants in the purchase, by a group or association of persons composed of plaintiffs and defendants and others, of an oil property in the state of Kansas. It appears that on or about November 1, 1917, one Batman owned an oil property in Butler county, Kansas, consisting of a quarter-section of land, upon which there existed some half a dozen flowing oil wells, which property he had leased to the Empire Gas & Fuel Company,

by the terms of which lease one eighth of all the oil produced constituted a royalty to the owner. The defendants R. J. Pryor and C. H. Martin were associated in the business of dealers in oil properties under the firm name of Pryor & Martin at Wichita, Kansas. The defendant Fred Tudor was apparently associated with them in some way, the exact character of his relations with them not very plainly appearing.

It is claimed by Pryor, Martin, and Tudor that on or about November 1, 1917, they secured an oral option for the purchase of this property at the sum of $150,000. They immediately endeavored to secure a sale of the property at the sum of $200,000. After failing in this, at Kansas City, they induced another oil-brokerage firm, Pryor & Maloney, of Duluth, to endeavor to form a syndicate for the purchase of the property for the sum of $200,000. The Pryor of the firm of Pryor & Maloney is a brother of R. J. Pryor, defendant herein. Pryor and Martin and Tudor then personally undertook the forming of a syndicate in Duluth for the purchase of the property at $200,000. One of the first men interested by these promoters was one F. C. Harris, a business man of Duluth. It was agreed that the property should be deeded to F. C. Harris, who should hold the same as trustee, and who should then execute to the various investors such an undivided interest in the whole property as each investment bore to the purchase price thereof, namely, $200,000.

By the 26th day of December, 1917, they had obtained cash from investors in the proposition in the amount of $29,000. On that date this amount was paid over to one J. B. Clark, and he executed to F. C. Harris an instrument in the nature of a land contract whereby, in consideration of the payment of $150,000, $29,000 of which was paid on that date, $21,000 of which was to be paid on or before January 15, 1918, and $100,000 on or before February 15, 1918, a good and sufficient title to said oil property was to

be conveyed to said F. C. Harris. Thereafter other investors were secured in the proposition and $100,000 in cash was raised. This was paid to Clark, who executed a mortgage on the property for the remaining $50,000, and a deed of the property was executed to Harris. Harris then had title to the property as trustee, subject to the $50,000 mortgage which had been given back to Clark. The relation of Clark to the property, and the reason for his giving the land contract, does not appear.

The denominator of the interests which the respective investors held in the property was thereafter reduced to $150,000, instead of $200,000, because, as was represented, $150,000 was all that had been paid on the property, and such interest was subject to the mortgage for $50,000.

The defendant *Cosgrove* was one of the first to subscribe for an interest in the proposition. His subscription was for $10,000. He was very active in the matter of exploiting the proposition of securing investors therein, acting throughout the campaign in conjunction with Pryor, Martin, and Tudor. To all prospective investors he represented himself as an investor to the extent of $10,000 and said that he was making arrangements to invest $5,000 more. Tudor and Martin represented themselves as investors to the extent of $10,000.

It is a verity in the case that neither *Cosgrove,* Pryor, nor Martin invested a dollar in the proposition.

On the 7th day of March, 1918, at the Hotel Radisson, in Minneapolis, Harris, Pryor, *Cosgrove,* and Martin mutually agreed that the $50,000 difference in the purchase and selling price of the property should be divided equally between them after all necessary expenses were paid. This agreement is in writing and is an exhibit in the case, and there is no dispute about the matter.

The plaintiffs in this action claim that they were induced to invest in the proposition upon the representations made by Pryor, Martin, *Cosgrove,* and Tudor that the purchase

price of the farm was $200,000; that that was the amount that was to be paid to the owner; and that no commissions or secret profits would accrue to any one, except that Batman, the owner, was paying Pryor and Martin a commission of $10,000, which Pryor and Martin were investing with the other investors in the proposition.

This action is brought by the plaintiffs for an accounting, with a prayer that the defendants be compelled to account for all secret profits made by them, and that they be compelled to convey to the plaintiffs, and to others similarly situated who may become parties to this action, the said interest in said premises so wrongfully held by them, and in case it should be found that, for any reason, they have put it out of their power to make said conveyance, that they be held to respond to the plaintiffs, and to others who may be similarly situated and who may become parties to this action, for damages.

The case was tried before the court without a jury, and findings of fact and conclusions of law were made and filed, upon which judgment was rendered dismissing plaintiffs' complaint, from which judgment so rendered plaintiffs bring this appeal.

For the appellants there were briefs signed by *Steele & Tipton* of Superior and *Fryberger, Fulton & Spear* of Duluth; and the cause was argued orally by *H. C. Fulton* and *W. M. Steele.*

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

Owen, J. The facts entitling plaintiffs to recover are either verities in the case or established by an overwhelming preponderance of the evidence. When one becomes a member of a group or association of individuals united for the purpose of prosecuting a joint or common enterprise, such as the purchase of property, each member of the group

owes to every other member thereof the duty of fair, open, and honest disclosure, and no member thereof can by connivance, deceit, or suppression of facts within the right, or to the advantage of every other member thereof to know, procure or accept secret profits, commissions, or rebates to the disadvantage of his co-adventurers. His relation to his associates is one of trust and confidence, and he holds gains acquired by his *mala fides* for the common benefit of his associates in proportion to their respective interests. A violation of his duty in that regard constitutes actionable fraud, and the usual remedies for the redress of fraud are available. This principle of law has been declared and applied over and over again by the decisions of this court, some of which are *Grant v. Hardy,* 33 Wis. 668; *Pittsburg M. Co. v. Spooner,* 74 Wis. 307, 42 N. W. 259; *Fountain Spring Park Co. v. Roberts,* 92 Wis. 345, 66 N. W. 399; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Hebgen v. Koeffler,* 97 Wis. 313, 72 N. W. 745; *Morgan v. Hodge,* 145 Wis. 143, 129 N. W. 1083; *Jones v. Kinney,* 146 Wis. 130, 131 N. W. 339.

It is a verity in the case that the defendants *Cosgrove,* Pryor, and Martin were, or pretended to be, investors in the enterprise and acquired substantial interests in the property. This fact alone laid upon them the duty of full and fair disclosure to their associates. They not only suppressed important and material facts, but the overwhelming preponderance of the evidence shows that they indulged in positive misrepresentation. Every investor who was a witness at the trial, eight in number, some of whom are not parties, testified with monotonous unanimity that either *Cosgrove,* Pryor, or Martin gave them positive assurance that the property was owned by Batman; that his price therefor was $200,000; that $200,000 was the sum he was to be paid; that there were no commissions to be paid to any one, except that Batman was paying Pryor and Martin $10,000 as commission for making the sale, which sum

Pryor and Martin were investing along with the others in the proposition; that every one was getting in on an equal basis and on the ground floor.

Besides this unvarying testimony on the part of the eight investors who were witnesses in the case, a copy of a prospectus was introduced in evidence, which a number of the investors testified was shown to them by one or the other of the defendants, Pryor, Martin, or *Cosgrove*. This prospectus was gotten up after $29,000 had been paid on December 26th and the contract executed between Clark and Harris. It showed, under separate headings, the description of the property, illustration of approximate profit, future possibilities, plan for raising and handling money, the title to the land, present shareholders, among whom appeared the defendant *E. S. Cosgrove* for the amount of $10,000, and Pryor and Martin, agents, for the amount of $10,000, the plan of payment, in which it was stated that $79,000 had already been paid on December 27, 1917 (whereas, as a matter of fact, only $29,000 had been paid, the difference between $29,000 and $79,000 representing the secret profit of $50,000); and under the heading of "Promotion Expense" appears this statement: "$10,000 commission is being paid by the present landowners to Pryor and Martin, investment brokers at Wichita, Kansas, for completing the sale of this property, and these men are putting their commission back into the property for an undivided one-twentieth interest." The existence or use of this prospectus is not denied by Pryor or Martin. *Cosgrove* testified: "I saw the prospectus Mr. Beals [a salesman] had in Pryor & Martin's office at the time he was trying to sell some of this stock to Mr. Leithhead. The only time I saw this prospectus was in Pryor & Martin's office. Beals was there at the time. I cannot say as to Pryor. I objected as to some of the names appearing on it. I do not know whether he made a new one or what he did."

When we consider the ubiquitous activity of *Mr. Cos-*

grove in promoting this enterprise, and his familiarity with the entire situation as pervades the record from start to finish, it is difficult to believe that he was quite as innocent of the existence of this prospectus as he claims to be. That it was used as testified to by the investors, and the representations therein contained urged upon them for the purpose of inducing them to join in the enterprise, can scarcely be doubted.

Upon these facts the principle of law stated at the opening of this opinion is clearly applicable. Every condition necessary to create liability on the part of the defendants exists. Defendants were co-investors with the plaintiffs. By reason of this relation the law imposes upon them the duty of full and fair disclosure of all material and important facts to their associates. They not only suppressed the fact that there was a $50,000 rake-off in the deal, but positively represented that the only commission arising or accruing from the transaction was a commission of $10,000 which Batman was paying to defendants Pryor and Martin, and which they were re-investing in the property as a testimonial of their confidence in the character of the investment.

It is the position of the defendants that they were not selling Batman's property, but were selling their own property, and that they were privileged to fix their own price upon it because it was their own property. They claim that it was a perfectly legitimate transaction for them to buy the property from Batman for $150,000 and sell it to this syndicate for $200,000, and cite the case of *Milwaukee C. S. Co. v. Dexter*, 99 Wis. 214, 74 N. W. 976. In that case the defendant Dexter had contracted for the purchase of a piece of land for the sum of $22,500, paid $6,000 of the purchase price thereon, obligated himself not only to pay the balance, but bound himself personally to erect and construct certain buildings, machinery, and outfits necessary for the cold-storage business, and to operate the same for seven years, and not to transfer the contract nor his right in the premises

without the approval of Lindsay Bros. In that case it was held that Dexter, in turning the property over to the corporation in which he was a stockholder, was dealing with his own property and might fix his own price therefor, without liability on his part to account to the corporation or to the stockholders thereof for the profit made by him in the transaction. There is no similarity between that case and this. As said in *Franey v. Warner,* 96 Wis. 222, 236, 71 N. W. 81:

"Cases cited, where a person sells his own property to a company in which he is interested at an increased price, fairly and openly, free from representations that he is selling the property of another, have no application to this case."

The defendants here failed to show that they had any interest whatever in the oil property. They claimed that Mr. Tudor had an oral option thereon. That is all that appears in the record. It does not appear from whom he got it, how long it was to run, or the manner in which payments were to be made. Not a dollar was ever paid for it. None of the defendants' money ever went into it even to this day. They had not a shadow of enforceable interest in it. The suspicion is very strong that what they termed an option amounted to no more than information on their part that Batman would take $150,000 for the property, acting upon which they endeavored to make a sale thereof for $200,000 and pocket the difference. Under some circumstances they might have done this, but when they formed a syndicate, so to speak, and became co-investors, the duty which they assumed towards the other investors prevented their profiting by any such duplicity.

The defendant *Cosgrove* is the only defendant before the court, the others not having been served, and we are principally concerned with his relation to this transaction, although the foregoing understanding of Pryor and Martin's relation thereto is essential to an understanding of *Cos-*

grove's position in the matter. *Gosgrove* testified at length, and it may be stated, generally, that he became acquainted and impressed with this property through a personal investigation thereof; that prior thereto he was more or less familiar with oil property in Kansas, having made other investments in that vicinity. Early in the campaign he subscribed for a $10,000 interest in this property. Thenceforward he was exceedingly active in making sales of interests in the property and of securing investors in the proposition. To all he represented himself as an investor to the extent of $10,000 and that his activity was prompted by a desire to see the proposition go through. He claims that he understood that Pryor and Martin were selling this property for $200,000; that he did not know the amount of the profit Pryor and Martin were making on the property until the memorandum agreement was signed at the Radisson Hotel in Minneapolis, and by which it was agreed that the $50,000 profit should be divided equally between himself, Pryor, Martin, and Harris. Before that time Pryor had given him his word that he would take care of him. He assumed there would be sufficient profit to take care of himself, partner, and any one who assisted him. After he learned of the $50,000 profit and accepted his proportion thereof, he went on selling interests in the property. He had spent $2,500 of his own money in promoting the enterprise and he received a $15,000 interest in the property.

That, in general, is the impression *Mr. Cosgrove* sought to convey by his testimony upon direct examination, and that really is all that is necessary for us to know. As far as he is concerned, we might as well let the case rest there. It seems that he himself knew that Pryor and Martin were making a commission out of the deal, although he did not know the amount thereof; that he went on spending his own time and money in promoting the enterprise upon the faith that Pryor would take care of him. He did not know what the margin of profit was, but assumed it would be sufficient

to take care of him. Being a co-investor with the others, he accepted this secret commission, said nothing about it to his co-investors, but after that continued his efforts to secure additional investors. But here is some of his cross-examination:

"*Q.* Did Mr. Pryor tell these plaintiffs he was selling the property, it was his property? *A.* Selling Batman's property. He had an option on the Batman property, and was selling it.

"*Q.* Did he tell them what Batman's price on that was? What they were paying Batman? *A.* Told them the price was $200,000.

"*Q.* There has been some talk here by all these plaintiffs about Pryor and Martin said they were getting $10,000. Did you ever hear about that? I mean back of that time, during the deal? *A.* I think I heard something about that.

"*Q.* Did they [plaintiffs] inquire if there was any commission or rake-off to you and Harris? *A.* I cannot recall.

"*Q.* You would not say that they did not make such inquiry? *A.* I would not say that they did not. I do not recall any."

He further testified that he told Mr. Seddon, one of the investors, that everybody was going in on the same basis, the investors as well as the men who held the option. Each investor was going in on a $200,000 basis.

From the foregoing it appears pretty plainly that whether he knew the exact amount of the rake-off Pryor and Martin were getting out of the transaction, he did know there was a rake-off and that he did represent to all investors that every one, including plaintiffs and defendants, were going in on an equal basis; that during all this time he assumed there was a rake-off, and that it would be sufficient to take care of him, all of which he concealed from his co-investors; that when the amount of the rake-off was revealed to him and an equal division thereof arranged between himself, Pryor, Martin, and Harris, after the expenses were paid, he accepted and pocketed his share thereof, and said nothing to his co-

investors up to that time, but continued his solicitation of other investors.

The findings of the trial court completely exonerate the defendant *Cosgrove* (and the other defendants as well) from any culpability in the matter, and stamp their conduct throughout with unrestrained judicial approval. The findings do not deal with the real issuable facts in the case. It is not found whether the plaintiffs and defendants were co-investors, whether defendants were selling their own property, whether a secret commission was made, whether it was represented that all were going in on an equal basis, nor whether the representations with reference to commissions testified to by investors were made or not. The findings upon questions affecting the legal liability are more in the nature of legal conclusions than findings upon issuable facts. For instance, it is found

"That as between the plaintiffs and the defendants, and especially the defendant *Cosgrove,* no fiduciary relations of any sort or description ever existed as to the subject matter of this controversy, and that the plaintiffs did not, or did any of them, at any time have any right to rely upon the statements of any of said defendants, especially defendant *Cosgrove,* to any extent or degree, except such reliance as they might reasonably indulge in as respected the attitude of said defendants as sellers or vendors of the property."

And again:

"That all the negotiations leading up to the consummation of the several sales of the several fractions to the plaintiffs in this action, and others similarly situated, were made without fraud, concealment, misrepresentation, or other illegal contrivance or unlawful device."

As will be noted, these findings are really legal conclusions and amount to this: The actions of the defendants did not constitute fraud. There is no finding, however, as to what their actions were, and we are led to doubt whether the learned trial judge had in mind the principle of law which

controls this case, as herein stated. If he did have it in mind, and it was his purpose to find that the defendants were not guilty of conduct bringing them within that principle, then we readily reach the conclusion that his findings are against the overwhelming preponderance of the evidence.

The complaint prays for the decree of the court to make an accounting of all that was done by them (defendants) in the premises; that they be compelled to account for all secret profits made by them; and that they be compelled to convey to plaintiffs, and to others similarly situated who may become parties to this action, the said interest in said premises so wrongfully held by them; and in case it shall be found that, for any reason, they put it out of their power to make such conveyance, that they may be held to respond to the plaintiffs, and to others who may be similarly situated and who may become parties to this action, for damages sustained by such plaintiffs and such parties. Judgment can go against *Cosgrove* only, as he was the only defendant served. It appears that he has put it out of his power to convey the larger portion of his interest unlawfully acquired. A money judgment for damages will therefore go against him. He, being a joint tortfeasor, is liable for the entire amount of the secret profit, amounting to $50,000. The plaintiffs are entitled to judgment for such proportion of $50,000 as their respective interests bear to $150,000. In order to ascertain this an accounting will have to be taken.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment in favor of the plaintiffs and against the defendant *Cosgrove* for such proportion of $50,000 as, upon accounting, it shall appear that their respective interests in the property bear to $150,000.

SPEAKES LIME & CEMENT COMPANY, Respondent, vs. DULUTH STREET RAILWAY COMPANY, Appellant.

September 24—October 19, 1920.

Street railways: Negligence: Collision with automobile: Contributory negligence: Turning onto track: Question for jury: Evidence: Beliefs and opinions of drivers of automobiles: Instruction as to burden of proof.

1. In the *first cause of action,* which was to recover for damages to two motor trucks struck by a street car when the drivers were attempting to clear the track after passing another vehicle, the evidence is *held* to justify a finding of the jury that the street car was negligently operated, though there were no street crossings in the vicinity and no ordinance regulating the rate of speed.
2. Where the drivers of the trucks saw an approaching street car about 1,100 feet away but believed they had time to pass, and did pass, a horse and wagon going in the same direction, by turning onto the track on which they were struck, their contributory negligence was a question for the jury.
3. In the *second cause of action,* to recover for damages to a motor truck struck by a street car when the truck was on the track area entered in order to pass another vehicle approaching from the opposite direction, the evidence is *held* to justify a finding of negligence on the part of the motorman.
4. The driver of a motor truck who saw an approaching street car, believed he had time to pass another vehicle and started to do so, and was struck by the car before he had come fully on the track and when still twenty-five feet in front of the vehicle which he intended to pass, is guilty of contributory negligence as a matter of law.
5. The admission of testimony of the truck drivers that in turning onto the track they believed they had time to make the turnouts with safety and without interfering with street cars, is not prejudicial error in view of the other testimony in the case.
6. It was not prejudicial error to give an instruction that where a party has the burden of proof he must establish the truth of the proposition involved not only by a preponderance of the evidence, but must satisfy the jury of the existence of the fact in controversy. The instruction given substantially follows the rule expressed in *Anderson v. Chicago Brass Co.* 127 Wis. 273, and does not authorize the jury to follow its own prejudice or caprice in determining the questions at issue.

Appeal from a judgment of the superior court of Douglas county: Solon L. Perrin, Judge. *Reversed.*

The appeal is from a judgment given upon the verdict of a jury for damages found in two causes of action.

Both causes of action arose from collisions between a truck or trucks of the plaintiff company and a street car of the defendant company, in which both trucks and street cars were damaged. Both causes of action were for damages to the trucks and for the loss of their use. In both there were counterclaims for damages to the street cars and for the loss of their use. The facts were these:

First cause of action: Two of plaintiff's trucks, driven by its drivers and loaded with gravel, were proceeding southward along the west side of Tower avenue in the city of Superior on the evening of October 8, 1919. It was dark and the weather was somewhat thick, though not such as to interfere materially with seeing lights and traffic on the street. The trucks were equipped with lights and they were lighted. For some blocks in either direction from the point of the collision the street appears to have been constructed with a ditch or rough area along the westerly edge which could not be traveled by vehicles. Between this and the center of the street was a strip of concrete pavement ten feet wide. Within two or three feet of the pavement and along the central area of the street ran defendant's single-track car line. The situation was such that a vehicle had to enter upon the track area in order to pass another more slowly moving vehicle upon the concrete pavement. This portion of Tower avenue ran through virtually open country, and there were no intersecting cross streets open for travel.

As the two trucks proceeded they caught up to a horse-drawn vehicle. Desiring to pass, they turned to pass it on the left, entering the track zone. About as they turned they saw the light of an approaching street car. The testimony was that the car was then three or four blocks away. They believed that they had ample time to pass, and con-

tinued. The first truck was delayed slightly in getting back on the concrete by its wheel slipping along the raised edge of the pavement. Just before it could clear the track the car struck it and carried it back and against the second truck, damaging both as well as the car.

There was evidence both that the car was traveling at an unusually high speed and that it was traveling at a normal speed for that section of the line.

The motorman of the car testified that he first saw that there was a vehicle on the street when about 200 feet from the truck, saw only one light then, and that the truck swung upon the track when about seventy-five feet from the car. The rails were slippery, and efforts to stop the car before striking the truck were unsuccessful.

Second cause of action: One of plaintiff's trucks, driven by its driver, had discharged a load and was proceeding northerly on the same Tower avenue on the morning of September 22, 1919. The day was clear, the light good. The east or right-hand side of the street was closed to travel, and the truck driver was therefore proceeding on the west side. The physical situation was otherwise similar to that in the first cause of action.

As the truck proceeded it approached a horse-drawn vehicle which was coming southerly along the street. The truck driver testified that he looked back to see if a car was approaching which might interfere with his passing the vehicle, and seeing one some two and one-half blocks back of him believed that he had ample time to pass. He testified that as soon as he drew his head in from looking he turned, but was struck from behind by the car before he had turned completely off the concrete and when there were still about twenty-five feet between him and the horse vehicle. The car pushed the truck ahead and into the ditch, about two truck lengths. Both truck and car were injured.

The motorman of the car testified that he saw the truck ahead of him driving close to the tracks but beside them;

that when about 150 feet back of the truck he blew his whistle and the truck turned toward the left away from the tracks; that he was then running about eighteen to twenty miles per hour, with the power off; that when he saw the truck turn toward the left he speeded up a little; and that when he was about fifteen feet back of the truck the latter suddenly turned on the track. He didn't see the horse vehicle before the accident; he thought it must have been obscured by the truck.

There was no evidence that the car was going faster than the motorman testified except such inferences as may be drawn from the circumstances of the accident.

The jury were directed to find a special verdict, and their findings so far as material are:

First cause of action: That defendant's motorman was guilty of negligence which proximately caused the damage to the trucks. That neither truck driver was guilty of negligence.

Second cause of action: That defendant's motorman was guilty of negligence proximately causing the collision. That the truck driver was not guilty of negligence.

Damages were assessed for each truck and car separately.

The defendant made the usual motions and they were severally denied. Judgment was then entered in favor of plaintiff upon the special verdict, and this appeal is taken therefrom.

For the appellant there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

For the respondent there was a brief by *W. M. Steele,* attorney, and *Steele & Tipton,* of counsel, all of Superior; and the cause was argued orally by *W. M. Steele.*

Jones, J. In the first and most important cause of action appellant's attorneys rely greatly on the facts that there was no ordinance restricting the rate of travel at the

point where the accident occurred; that for a long distance there were no intersecting streets, and that no danger was to be apprehended of travel across the track; that the drivers of the trucks were aware of the rate of speed usually traveled by the street cars, and, as claimed, that they observed that at the time in question the street car was going faster than usual. Appellant's counsel also lay great stress on the fact that this was not the usual case of a collision at a street crossing, and argue that this case must be distinguished from that class of cases. It is argued that the drivers of the trucks saw the approaching car in time to avoid the collision and that they should have slowed up or stopped their trucks.

It is claimed by respondent's counsel that the street car was going at the rate of more than forty miles an hour, and there was considerable testimony, which it is unnecessary to detail, from which the jury could have reached that conclusion.

It is true there were no street crossings for some distance from the scene of the accident and there was no ordinance regulating the rate of speed. But these facts would afford no excuse for running the car so rapidly that it could not be controlled so as to avoid injury to those lawfully and properly using the street with ordinary care. There was a good deal of travel on the street by all kinds of vehicles. The travel was practically confined on either side of the track to the strip of concrete ten feet in width, which was only seven inches from the overhang of the car. No vehicle could pass another without passing upon the street-car track. The motorman did not see the truck until within a distance of 200 feet of it and did not see the horse and wagon at all. The headlight on the car was so constructed that it did not cast a light which would reveal vehicles at the side of the road.

All these were circumstances which the jury had the right to consider in passing on the question of defendant's negli-

gence, and we cannot say that the jury were not justified in their findings on that issue.

The objection that the plaintiff was guilty of contributory negligence is more serious. The drivers of the trucks were going at a speed of about fifteen miles an hour upon a street of the character already described, when, as they overtook a horse and wagon going slowly, they saw defendant's car coming toward them three or four blocks, or 1,110 to 1,480 feet, away. There was no obstruction of the view and nothing to divert attention from the approaching car.

It is the testimony of the driver of the first truck that on first seeing the street car about three blocks away he did not observe that it was going unusually fast, but did notice it on looking the second time when he had entered on the track. When he saw the car he estimated that he easily had time to pass the horse and wagon in safety. On account of the rough space between the track and the concrete on the westerly side the driver was slightly delayed and had some unexpected difficulty in passing the horse and wagon. In this calculation he was mistaken, and after he had the front part of the truck back upon the concrete the street car struck the front left corner of the box, which was located about eleven feet back of the front end.

The jury may well have believed that if the street car had been going at the rate of twenty-five or even thirty miles an hour no collision would have happened. There is sufficient evidence that the truck driver was not mistaken as to the distance of the street car from him when he commenced to turn upon the track. Nor could he then determine that the car was coming at an excessive rate of speed.

Although this case differs from most of those cited in that the accident was not at a street crossing, we are not convinced that the rules declared by this court as to crossing cases are entirely inapplicable. In *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 119 N. W. 833, the plaintiff saw a car approaching at a distance of about 900 feet. He be-

lieved that he had time to turn his horse around and cross in safety. It proved that he was mistaken, and the court held a nonsuit improper. In that case there was involved not only the crossing of a street but the turning around necessary to accomplish it. In the present case the street-car zone, under the conditions existing, had to be used every time vehicles passed each other, and we see no reason for laying down any new rule as to negligence.

In the *Grimm Case* the following paragraph was quoted from *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823. It was also quoted with approval in the recent case, *Dahinden v. Milwaukee E. R. & L. Co.* 169 Wis. 1, 4, 171 N. W. 699:

"A person desiring to cross a street-car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track; the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else."

On the street in question it was just as legitimate a use of the track of defendant to pass a team as to use it in crossing a street. As in the cases cited above, the question seems to be whether the drivers of the motor trucks used ordinary care under all the circumstances in calculating that they had sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car,

assuming that it was moving at a lawful and reasonable rate of speed. We are convinced that it was a proper question for the jury.

In the second cause of action the damages allowed were only $83.15. The damages to the street car, as found by the jury, were but $46.50. There was much less testimony as to the manner of the collision, and the printed arguments were comparatively brief.

The jury found that defendant's motorman in charge of the car was negligent. Evidence of negligence was certainly more meager than in the first cause of action. There was no direct evidence that the car was traveling faster than the speed testified to by the motorman. The motorman testified that he was going eighteen to twenty miles per hour as he approached defendant's truck, and speeded up somewhat after he had reason to believe the truck driver knew of his approach. The jury may have felt that this speed was unreasonable in view of the use of the street, its type of construction, and the restricted area then open for travel. The jury may have felt that the motorman's failure to see the horse-drawn vehicle approaching and about to meet the truck evidenced lack of care. The jury may have believed there was a lack of proper warning of the approach of the car, and may have drawn inferences of unreasonable speed and lack of control from the circumstances and results of the collision. We cannot say as a matter of law, under the evidence presented, that the jury were not justified in finding that the motorman was guilty of negligence.

The jury also found that the truck driver was not guilty of negligence. The verdict stands upon far less secure ground here, if in fact any credible evidence can be found to support it. The facts as to contributory negligence differ radically from those in the first cause of action. There the truck drivers saw the car, believed they had time to pass, did pass, were unexpectedly delayed in getting back

off the tracks, and yet missed clearing the car by a narrow margin. These facts, taken in connection with the fact that the jury might well have found that the car was traveling very fast, justified the jury in concluding that the truck drivers were not negligent. In this cause of action, however, the testimony of the truck driver himself was that he saw the car,—it was closer than in the first cause of action,—believed he had time to pass, started to do so, and was struck before he had come fully upon the track and when he was still twenty-five feet in front of the vehicle he intended to pass. He did not miscalculate by a few feet. His calculation, if he made one, was grossly inaccurate. The collision could not have occurred as he stated unless, to compute from the most conservative of the figures he testified to, the car had traveled the two and one-half blocks from about where it turned on the main track from a switch at an average speed of seventy-five miles an hour. To compute from the figures used by plaintiff's counsel in their brief the average speed must have been 120 miles or more an hour.

That the car was making such a speed is incredible and contrary to all the direct evidence in the record. That if it were making such a speed it would have been evident to any one looking at it within two and one-half blocks seems certain. To enter the tracks under such circumstances would be negligence. The conclusion from the evidence seems to us inevitable that the truck driver did not exercise the care of an ordinarily prudent man under the circumstances, and that he did not make and act on any reasonable calculation of his chance to pass without any interference with the car moving at a reasonable speed, as was his duty as laid down in the cases cited above.

In our view of the case the truck driver was guilty of negligence as a matter of law. The trial judge erred in not granting defendant's motion to change the answers of the jury to questions 10 and 14 of the special verdict.

Appellant's counsel assign as error that in both causes of action the drivers of the trucks, over objection, were allowed to testify in substance that they believed that they had time to make the turnouts with safety and without interfering with the street cars.

It is argued that the witnesses were thus allowed to give their beliefs and opinions as to the ultimate issue in the case. With this view we do not agree. When there were cars in sight it was certainly necessary for the drivers to use their judgment before entering upon the tracks. If they had not testified to so doing the jurors might have drawn unfavorable inferences. The real question at issue was not whether they believed they were safe and would not interfere with the street cars, but whether from the standpoint of a person of ordinary care and intelligence under all the circumstances they acted reasonably. Although the subject of the admissibility of such evidence is not discussed in the *Tesch Case* and the *Dahinden Case,* above cited, it is mentioned in both that the plaintiff thought or estimated that he had time to make the crossing without injury. If in this case the testimony had been excluded, we cannot believe, in view of the other testimony, the acts of the drivers, and their instinctive regard for their own safety, all of which would have been considered by the jury, the verdict would have been different. We hold, therefore, that in the reception of this testimony there was no prejudicial error.

The following instructions were given to the jury:

"When in these instructions I have charged you that the burden of proof rests upon a party plaintiff or a party defendant to this action, you are instructed that in order to establish the existence of a fact it is incumbent upon the party upon whom the burden of proof is cast to establish the truth of the proposition involved, to your satisfaction, by a preponderance of the credible evidence in the case, and you must be satisfied by a preponderance of such evidence

that such fact does exist; unless you are so satisfied your finding should be against the party upon whom the burden of proof is cast. . . . If the evidence is so evenly balanced that you cannot determine upon which side it preponderates, or if it preponderates against the party on whom the burden of proof rests, or if it preponderates in favor of the party upon whom the burden of proof is cast, and, notwithstanding such preponderance, you are not satisfied of the existence of the fact in controversy, your finding should be against the party on whom the burden is cast."

It is urged by appellant that by these instructions the jury were permitted to decide the ultimate questions involved by some other rule than that of the preponderance of the credible evidence in the case. We do not construe either of these instructions as authorizing the jury to follow its own prejudices or caprice in determining the questions at issue. On the contrary we believe the instructions substantially followed the rule expressed in *Anderson v. Chicago B. Co.* 127 Wis. 273, 280, 106 N. W. 1077, as follows:

"It is well settled by a long series of decisions in this court that the party upon whom rests the burden of proof does not lift that burden by merely producing a preponderance of evidence. He may produce a preponderance, that is, he may produce evidence of slightly greater convincing power to the mind than that produced by his opponent, but still his evidence may be weak and leave the mind in doubt. In order to entitle himself to a finding in his favor his evidence must not only be of greater convincing power, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention. This idea, in some definite and certain form, must be given to the jury or the instruction will be incomplete and erroneous." Citing numerous cases.

We are satisfied that in giving these instructions no prejudicial error was committed.

Objection was made to evidence on the question of damages and that the damages are excessive, but we find no reason for reversal on that ground.

It follows from the conclusions reached by us that the counterclaim of defendant is not sustained.

By the Court.—Judgment reversed. Cause remanded for further proceedings in accordance with this opinion. No costs allowed in this court except clerk's fees, to be paid by appellant.

WISCONSIN TRUST COMPANY, Administrator, Respondent, vs. COUSINS, Commissioner of Banking, imp., Appellant.

March 13—November 16, 1920.

Banks and banking: Liquidation of trust company by commissioner of banking: Enlargement of time to file claims: Rights of belated claimant as to prior dividends: Filing claim with commissioner as condition precedent to action: Negligence of trust company in making investments: Bills and notes: Renewal or discharge: Statute of limitations: Accrual of action: Executors: Failure to press claim against executor personally.

1. The commencement of liquidation proceedings against a trust company by the commissioner of banking under sec. 2022, Stats., suspends, so far as the commissioner is concerned, the running of the statute of limitations (sub. (5), sec. 4222) as to any then existing obligation of the trust company, so that any subsequent interval between the commencement of the liquidation proceedings and the presentation of a claim for relief by any creditor should not be counted as any part of the statutory period of six years.
2. Notwithstanding sub. (5), sec. 4222, Stats., provides for no exceptions in any situation and it has been applied although apparent hardship has resulted, it has been held on the ground of public policy not to apply to transactions between husband and wife (*Flanagan's Estate v. Flanagan's Estate,* 169 Wis. 537); and in this case, where the state at its own instance, through a public official (the commissioner of banking), assumes complete jurisdiction in liquidation proceedings over the property of a debtor, it is *held* that the commissioner of banking is placed in such a trust relationship to the property of the insolvent and its creditors that the statute of limitations then running as against the debtor must be stayed.
3. It is necessary that the transaction, relied upon by a claimant against the assets of an insolvent trust company, shall be

first set forth by the claimant in a claim presented to and filed with the commissioner of banking before any other proceedings can be instituted by such claimant creditor as against such commissioner, the assets in his hands, or securities pledged with the state treasurer by the trust company.

4. On a proper showing of good excuse for claimant's failure to file a claim within the time originally fixed by the commissioner of banking, engaged in the liquidation of an insolvent trust company, the circuit court may permit the claimant to file his claim against the assets of the trust company after the expiration of said time.

5. Where the claimant is permitted by the court to file his claim after the expiration of the time originally fixed, he can share in the distribution of assets by means of dividends only to the extent of assets in the hands of the commissioner at the time of the filing of his claim and then applicable for distribution and cannot share in prior dividends.

6. Investments made in a particular loan by the trust company and continued by it as parts of either of two renewal loans of date ten years later, are in effect but parts of one continuous transaction. The statute of limitations therefore begins to run from the time of the original and improper investment.

7. A renewal of an obligation by the giving of a new note or the extension of time in which to pay a pre-existing debt is but a mere carrying on of the prior obligation, unless it appears that the parties agreed it should be a destruction of the old and the creation of a new obligation. The giving of additional security at the time of renewal or extension of time of payment of the pre-existing debt by the giving of a note of a third person, or otherwise, does not alter the creditor's right to continue to reap all the benefits of the pre-existing obligation and does not relieve the debtor from the original obligation.

8. Where investments in a particular loan made by a trust company as agent were improvident and improper, a cause of action arose for its negligence.

9. Where a client of the trust company died before the cause of action arising from an improvident loan was barred by the statute of limitations, and before the expiration of the year limited by sec. 4234, Stats., for his executor to sue on such cause of action the trust company itself became executor, it breached its duty in qualifying as executor and thereafter failing to take any proceedings to enforce or collect the claim for its own negligent investment before the same should be barred, and for such breach of duty a new and independent

cause of action arose against the trust company in favor of the client.

10. Interest is allowable on the amount of a liability of an executor for breach of duty in failing to prosecute a cause of action from the date when, by its failure to act within the statutory period, the right against it for its breach of duty became fixed.

11. Where a trust company, as executor of the estate of a deceased client for whom it had invested money, received a substantial amount on account of bonds in which it had invested the funds of the client, it breached its duty as executor in failing to see to it that the proportionate share of the payment on account of the bonds was turned into the assets of the estate.

12. Where the original claim filed with the commissioner of banking referred to the negligent investment by the trust company originally and not to new or independent causes of action arising because of breach of duty by the trust company as executor, there was no foundation for the allowance by the trial court of any claim based on the latter theory.

APPEAL from a portion of a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed and modified.*

In this as well as in the following cases the appeals present questions arising out of transactions involved in the liquidation proceedings of the Citizens Savings & Trust Company, commenced October 2, 1913. The respective actions were brought, after filing claims and the disallowance thereof, to have certain claims allowed, and when allowed to be permitted to share in the assets in the hands of the commissioner, and, as to certain of the claims, to be allowed to participate in certain securities placed by the Trust Company in the hands of the state treasurer. A large number of items were involved in these several actions other than those here presented. The disposition of such other items by the trial court is not questioned on these appeals.

Many of the facts in the following statement are applicable to the situations involved in the subsequent cases and will not be there repeated.

(For convenience the Citizens Savings & Trust Company, impleaded defendant, is hereafter referred to as the Trust Company; the commissioner of banking, whether the former commissioner, A. E. Kuolt, or the present commissioner, *Marshall Cousins,* as commissioner; and the Kaukauna Gas, Electric Light & Power Company as the Kaukauna Company.)

The general nature of the transactions involved in this and the other actions and the relationship of the various parties is shown in the following recitals:

For a long time prior to 1903 the law firm of Nathan Pereles & Sons conducted and carried on in the city of Milwaukee the business of lending and investing money for their clients. In 1903 James M. Pereles and Thomas J. Pereles were the sole members.

In July, 1897, the Citizens Loan & Trust Company was incorporated under the laws of the state of Wisconsin with a capital stock of $100,000 by said James M. and Thomas J. Pereles. In 1903 it took over the said loaning and investment business of said Nathan Pereles & Sons and its name was then changed to Citizens Trust Company and the capital stock increased to $300,000. It then deposited with the state treasurer of Wisconsin securities to the amount of $101,000, under the provisions of the then statutes relating to trust companies and trust company banks, and such securities thereafter remained in the hands of such state treasurer substantially as so deposited until after the liquidation proceedings were commenced.

In December, 1909, the necessary steps were taken by which such Citizens Trust Company accepted the provisions of ch. 186, Laws 1909, relating to trust company banks, and thereafter remained under the provisions of said law. December 1, 1911, the name was changed to Citizens Savings & Trust Company.

On October 2, 1913, said Trust Company was declared to be insolvent and was taken possession of by A. E.

Kuolt, then state banking commissioner, and remained in his possession as such until December, 1918, when he was succeeded as such commissioner by the defendant and appellant, *Marshall Cousins,* who since such time has continued such possession and control.

Shortly after October 2, 1913, due notice was given by the then commissioner to all persons who might have claims against said Trust Company so that due proof thereof might be made. The time fixed for filing and presenting such claims terminated February 26, 1914.

Pursuant to order of the circuit court for Milwaukee county a dividend of twenty-five per cent. on the claims then presented and allowed was made in April, 1914, and a further dividend of twenty per cent. in the same manner on or about September, 1918. Certain of the claims presented and filed with the commissioner were by him rejected and disallowed. Thereafter and in apparent compliance with sub. 5, sec. 2022, Stats., these actions were begun in the circuit court by certain of such claimants. The general facts as to certain particular transactions follow.

Edward Zohrlaut Loan.

June 19, 1899, the Trust Company made a loan to one Edward Zohrlaut of Milwaukee, known on its records thereafter as loan No. 371, for $100,000, taking Zohrlaut's promissory note with a pledge of 1,930 shares of the stock of the Herman Zohrlaut Leather Company. At the same time Edward Zohrlaut gave to his father another note for $100,000 secured by other shares of stock in the same corporation. Edward Zohrlaut at such time had substantially no other property than such stock and it was wholly inadequate security for the loan by the Trust Company. This note was renewed from time to time by the giving of new notes until August 2, 1909, and the last of such renewal notes was surrendered and marked on the loan register of the Trust Company, "canceled by new notes No. 3706 and

3707, August 2, '09." A new record was then made in the loan register; one of loan 3706 by the Zohrlaut promissory note for $25,000 secured by a mortgage on his homestead; another as loan 3707 covering two notes, one of $25,000 and the other of $50,000, thus making by the three notes the $100,000 of the original transaction. These two notes thus aggregating $75,000 were secured by the pledge of the same 1,930 shares of the stock of the leather company which had been pledged in the first transaction. There was no material change in Edward Zohrlaut's financial condition between 1899 and August 2, 1909.

No payments were made on the principal of these three notes, but interest was paid on them until May 1, 1913. The Edward Zohrlaut Leather Company and Edward Zohrlaut were in March, 1914, adjudicated bankrupts and no substantial payments, if any, were made to their respective creditors.

Kaukauna Gas, Electric Light & Power Company Transaction.

(Some features of this transaction were presented and disposed of in the case of *Connell v. Kaukauna,* 164 Wis. 471, 159 N. W. 927, 160 N. W. 1035.)

April 10, 1906, the Kaukauna Gas, Electric Light & Power Company, a Wisconsin corporation (on whose board of directors was one of the Pereles, then and thereafter a principal officer and director of the Trust Company), obtained a loan from the Trust Company of $75,000 and issued a series of bonds secured by a trust deed upon its plant and property. The Trust Company was named and acted as trustee for the holders of such bonds and distributed them among its clients in similar manner to that above recited.

The value of the plant and property did not at that time exceed $50,000, as was known to such officers of the two companies, and it was not adequate security for the $75,000

issue of bonds which were thus parceled out by the Trust Company.

Subsequently the city of Kaukauna, in appropriate proceedings, obtained control and ownership of the public utility and property of the Kaukauna Company, and as consideration therefor paid to the Trust Company July 11, 1912, the sum of $45,294.40 on account of the then outstanding bonds of the Kaukauna Company. Instead of applying such amount in proportionate payments to its clients then holding such outstanding bonds or interest in the original investment of $75,000, the Trust Company converted such payment to its own use.

Clark Realty Loan.

March 1, 1905, the Trust Company loaned $150,000 to the Clark Realty Company and took as security therefor a mortgage conveying about seventeen parcels of real estate, but the value of which did not exceed $120,000. The Trust Company in the exercise of ordinary care should have known at such time and continuously thereafter that such security was inadequate for the $150,000 loan, and the Trust Company was negligent in its investing of funds of its clients in such loan. Interest appears to have been paid up to May, 1913. The mortgage has been foreclosed and the Clark Realty Company has been adjudicated a bankrupt with no assets available for any deficiency judgment.

The loss to those whose moneys were invested in this particular loan will be about thirty-five per cent. of the principal.

The method pursued by the Trust Company with reference to these particular transactions and many of the others involved was to make the entries upon its loan register of the names of the respective clients whose moneys were invested in such prospective loans, and corresponding entries were made in pass-books issued to such clients and in which the accounts were continued as to such transactions and of

the interest paid thereon, such entries in the pass-books customarily being made semi-annually. In some of the loans a form of so-called participating certificate was given by the Trust Company.

Particular items involved in the appeal in this action:

First. In the Zohrlaut loan: The Trust Company invested during Williams' lifetime, on June 19, 1899, $4,000 in the original Edward Zohrlaut loan No. 371, and on May 1, 1905, $3,000 in the same, these two items being carried on the loan register and pass-book as part of the original loan No. 371. (These two items were disallowed by the trial court as being barred by the statute of limitations.) The trial court did, however, allow the total of these two items on the ground that there was an improper reinvestment of the total thereof by the transaction as to the Zohrlaut loan of August 2, 1909. After such date these two investments appeared on the list of clients whose funds were treated by the Trust Company as in loan No. 3707, being the one for the notes aggregating $75,000 and secured by the 1,930 shares of the leather company stock; neither of these items appearing as being any part of the loan No. 3706 of $25,000 secured by the homestead mortgage.

Second. In the Kaukauna Company loan: An investment by the Trust Company of $16,000 was made in the bonds of the Kaukauna Company April 10, 1906, and a further investment of $2,000 on November 10, 1907. This involves also the failure of the Trust Company to apply a proper proportionate share of the $45,294.49 received by it July 11, 1912, in part payment of such bonds to the bonds then belonging to the estate of Williams, of which the Trust Company had been executor since June 19, 1911.

Third. Clark Realty Company loan: In this the Trust Company invested on September 15, 1906, $1,200 in loan known as No. 2328, upon which the court found there had been a partial loss.

The claim of the plaintiff was filed with the commissioner

within the proper time and in January, 1914. The substance of the facts recited in such claim was as follows:

That Morgan P. Williams died April 7, 1911; the Citizens Trust Company was appointed June 14, 1911, as sole executor of his will and duly qualified; the filing of an inventory in October, 1912, by the Trust Company as such executor showing assets in its hands of the value of $52,375.56.

"That notwithstanding the law governing the investment of trust funds, said Citizens Savings & Trust Company as said executor invested the assets of said estate and permitted the same to remain invested in securities which did not comply with said law and large parts of which were and are valueless or of very little value, and which said Citizens Savings & Trust Company as such executor knew, or ought to have known at all times while acting as said executor, were valueless or of very little value; and that notwithstanding the premises said Citizens Savings & Trust Company as said executor made no effort to sell or convert said assets or any part thereof although it could readily have done so. That among such securities are those set forth in Schedule A, hereunto attached and made a part hereof, and that your claimant has marked opposite each of said items the value thereof according to its best judgment and information; that it has sought diligently to ascertain the value of said items and each of them, and that said statements in said schedule are true to the best of its knowledge and belief."

The Schedule A referred to above and attached to said claim, so far as relating to the items here, was as follows:

E. Zohrlaut Note P. C.....	$7,000.	Supposed worthless.
Clark Realty Co. P. C.....	2,200.	Supposed worthless.
Kaukauna Elec. Co. bonds..	18,000.	Supposed worthless.
Clark Realty Co.....	500.	Supposed worthless.

The claimant prayed to have its claim allowed in the sum of $51,679.90. September 22, 1914, the claim was rejected and due notice given.

In March, 1915, this action was brought by service of

summons. An order was made extending the time for serving the complaint pending an examination of certain officers of the Trust Company who had been made parties under sec. 4096, Stats., but this examination was never completed.

January 25, 1919, a verified complaint was served. This complaint, so far as material here, prayed for an accounting to recover damages by reason of improvident investments made by the Trust Company during the lifetime of deceased and of moneys belonging to his estate while acting as executor and trustee under his will. It also pleaded as a separate cause of action a breach of duty by the Trust Company after becoming executor in failing to sell and dispose of improper securities theretofore held by the Trust Company. And for a third cause of action that the Trust Company received $45,294.49 in July, 1912, from the city of Kaukauna upon its purchase of the property covered by the trust deed of the Kaukauna Company, and that thereupon it became the duty of the Trust Company to apply, as a proper proportionate amount of such payment, the sum of $10,870.56 toward the payment of the bonds of the said Kaukauna Company in which Williams' money had been invested; that its failure to do so was a conversion of such sum to its own use.

Several defenses were interposed based upon certain statutes of limitation, and further, that as to certain of the items as so presented in the complaint they had not been first presented to the commissioner as a claim in the liquidation proceedings.

From so much of the judgment entered below as adjudged that the three several items above specified became proper charges against the assets either in the hands of the commissioner or the state treasurer the defendant commissioner of banking has appealed.

For the appellant there was a brief by *Flanders, Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *George Lines*.

The following opinion was filed July 17, 1920:

ESCHWEILER, J. Several questions are presented on this appeal which are also applicable in the following cases and they will be first determined. They require construction of certain portions of the statute under which the liquidation proceedings commenced by the commissioner of banking against the insolvent Trust Company were instituted and carried on, viz. sec. 2022, Stats. Such sec. 2022 gives the power, in the instances therein specified, to the banking commissioner of this state to take possession of banks or corporations doing a banking business such as the Trust Company was in this instance, and provides for the manner of winding up its affairs. The subsections particularly concerned in this opinion are as follows:

Section 2022. "*Claims; notice.* 5. The commissioner shall cause notice to be given by advertisement, in such newspapers as he may direct, weekly for three consecutive months, calling on all persons who may have claims against such bank or banking corporation, to present the same to the commissioner, and make legal proof thereof at a place and within a time, not earlier than the last day of publication, to be therein specified. The commissioner shall mail a similar notice to all persons whose names appear as creditors upon the books of the bank or banking corporation. If the commissioner doubts the justice and validity of any claim, he may reject the same, and serve notice of such rejection upon the claimant either by mail or personally. An affidavit of the service of such notice, which shall be *prima facie* evidence thereof, shall be filed with the commissioner. An action upon a claim so rejected must be brought within six months after such service. Claims presented after the expiration of the time fixed in the notice to creditors shall be entitled to share in the distribution only to the extent of the assets in the hands of the commissioner equitably applicable thereto."

"*Dividends.* 8. At any time after the expiration of the date fixed for the presentation of claims, the commissioner

may out of the funds remaining in his hands after the payment of expenses declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors, he may declare a final dividend, such dividends to be paid to such persons, and in such amounts, and upon such notice, as may be directed by the circuit court for the county in which such bank or banking corporation is located. Objections to any claim not rejected by the commissioner may be made by any party interested by filing a copy of such objections with the commissioner, who shall present the same to the circuit court at the time of the next application to declare a dividend. The court may make proper provision for unproved or unclaimed deposits."

The questions presented are as follows:

1. Did the commencement of these liquidation proceedings on October 2, 1913, under said sec. 2022, Stats., suspend, at least so far as the commissioner of banking was concerned, the running of the six-years statute of limitations (sub. (5), sec. 4222, Stats.) as to any then existing obligation of the insolvent Trust Company so that any subsequent interval between such commencement of the liquidation proceedings and the presenting of a claim for relief by any creditor should not be counted as being any part of the statutory period of six years?

2. Is it necessary that the transaction relied upon by a claimant as the basis for his right to participate in the assets of such insolvent Trust Company shall be first set forth by him in a claim presented to and filed with the commissioner of banking before any other proceedings can be instituted by such creditor as against such commissioner or the assets in his hands or the securities pledged with the state treasurer by such Trust Company?

3. May a claim be presented and allowed after the time originally fixed in the notice to creditors as given by the commissioner? and

4. In case such belated claim is presented and allowed, may it properly participate in prior dividends?

On the first of the above questions we hold that the commissioner of banking acts under this statute as trustee for all the creditors. That after taking possession and control of all the assets of the insolvent Trust Company by virtue of the statutory power granted him, he ought not to be heard to assert that the time intermediate his so taking possession and the proper filing of a claim in such proceeding shall be considered as any part of the six-year statute of limitations then running against such claim. In other words, that, so far as the commissioner of banking is concerned, he having by authority of law taken possession of all the property of the debtor and thereby practically deprived the creditor of any right to pursue the debtor or its property by other proceedings, it must be held that the law thereby stayed, as to him at least, the then running of the statute of limitations.

Sub. (5), sec. 4222, Stats., would bar a right of action to recover upon any of the causes of action based upon the negligent investment of funds by the Trust Company within six years after such investment. This statute makes no express exception as to its application in any situation and at least such as is presented here. The application of this statute in its literal form often works apparent hardship, and even where a positive fraud is worked and the victim thereof remains in ignorance of its perpetration until after the six years have expired the statute has nevertheless barred his right. *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342; *Ott v. Hood,* 152 Wis. 97, 139 N. W. 762; *Casper v. Kalt-Zimmers M. Co.* 159 Wis. 517, 149 N. W. 754, 150 N. W. 1101; *Stahl v. Broeckert,* 170 Wis. 627, 176 N. W. 66.

Notwithstanding the imperative form of this statute, it has been held on the ground of public policy that it does not apply to transactions between husband and wife, although in so holding there is in effect an exception read into the statute by judicial construction based upon recognition of the overriding weight of the public policy involved in the

marriage relationship. *Flanagan's Estate v. Flanagan's Estate,* 169 Wis. 537, 542, 173 N. W. 297.

We think there is in the situation here presented another instance where the public policy shown in providing such a far-reaching and exclusive remedy as is involved in this liquidation proceeding—by which the state itself, through one of its officials, steps in and at its own instance rather than that of private persons or individual creditors assumes such complete jurisdiction over the business and property of a debtor—must be held to place the public official in such a trust relationship to the property of the insolvent and its creditors that the statute of limitations then running as against the debtor must be stayed. The creditor who can no longer resort to the debtor or his property by independent action must be deemed now to stand in such a new relationship towards such property held by the commissioner of banking as to stay the running of the old and begin the running of a new statute.

A similar conclusion has been arrived at in other jurisdictions with reference to such statutory proceedings as are involved in voluntary assignments or insolvency laws. *Minot v. Thacher,* 48 Mass. 348; *Ludington v. Thompson,* 153 N. Y. 499, 47 N. E. 903; *Kirkpatrick v. McElroy,* 41 N. J. Eq. 539, 555, 7 Atl. 647; *Hignutt v. Garey,* 62 Md. 190, 192; *In re St. Paul German Ins. Co.* 58 Minn. 163, 59 N. W. 996, 26 L. R. A. 737; 2 Wood, Limitations, p. 960.

The second of the above questions requires an affirmative answer.

The wide sweep of power and authority given to the state official in these liquidation proceedings under sec. 2022, Stats., if not absolutely exclusive of all other remedies to the creditors, at least renders all other remedies of no practical value. The statute gives the commissioner wide power and discretion in passing upon the justice and validity of the demands made by respective claimants upon such

assets in his hands. The evident intent and purpose of the statute is to provide a direct, simple, expeditious, and economical manner of disposing of the claims against the assets belonging to such insolvent. It is evident that the statute intends that there shall be first presented to the commissioner, for his determination as to its justice and validity, a statement of and a reference to the transaction upon which the claimant predicates his right to participate in the assets. Until he has done so and the commissioner has passed upon and then rejected such claim, the creditor has no right to bring an independent action against the commissioner for the purpose of subjecting the assets in his hands or those pledged with the state treasurer to possible payment of the claim. To hold otherwise would be to open the door to manifest multiplicity of suits, delay, and additional expense.

The third question must be answered Yes.

The legislature in this statute made no express provision to the effect that the failure to file such a claim with the commissioner before the expiration of the time fixed by him under such statute for the giving and filing of such notice shall be an absolute bar to the right to subsequently make and file such claim, yet the last clause of sub. 5, sec. 2022, as quoted above, very plainly recognizes that the legislature understood that there was still left open a possibility for a belated claimant to present his claim after the time so fixed, but no terms or conditions are specified anywhere in the statute upon which such relief can be had.

By other subsections of said sec. 2022, and particularly sub. 11, 12, and 14, it is evident that it was intended, in spite of the broad and *quasi*-judicial powers given to the commissioner, that nevertheless he should be, as are all trustees, subject to the general supervision and control of the circuit court. Such supervisory power of the circuit court being expressly recognized in this statute in many matters, we arrive at the conclusion that, upon a proper

showing of good excuse for his failure being made, the circuit court may grant permission to file a claim after the expiration of the time originally fixed to him who has failed to file his claim within the time specified; the situation so evidently recognized by the last sentence of sub. 5, sec. 2022, Stats., *supra,* as to subsequent claims being thereby met.

As to the fourth of the above stated questions, the answer must also be reached without help from other sources than by a construction of the statutory language. From such consideration we hold that it is the intent of the last clause of said sub. 5, *supra,* that the belated claimant shall share in the distribution only to the extent of the assets in the hands of the commissioner at that time equitably applicable for such then distribution. That is, that the language "equitably applicable thereto" must speak only as of the time at which such claim is presented to the commissioner. Such belated claimant is not equitably entitled to share with the diligent creditor in dividends that have theretofore been paid to such diligent creditor. To the extent of such prior payment the assets used in such payment are no longer present to be subject to any equitable right of such belated claimant to participate in their distribution.

A question of importance not only in this case but in several of those following is presented in the consideration of whether or not the trial court was correct in holding as he did that the original Zohrlaut loan No. 371, made by the Trust Company in June, 1899, for $100,000, and then secured by a pledge of 1,930 shares of stock in the Herman Zohrlaut Leather Company, was so satisfied and discharged that there was neither in substance or effect a renewal thereof, but instead a new loan and a separate and independent transaction by the acceptance on August 2, 1909, of the three notes; one, loan No. 3706 for $25,000 secured by a mortgage on the Zohrlaut homestead; and loan No. 3707 of two notes aggregating $75,000 and secured by the pledge of the same 1,930 shares in the leather company.

The trial court held in effect that the statute of limitations commenced anew from such transactions of August, 1909. We think the trial court was in error in arriving at such conclusion, and we now hold that as to investments made in the original Edward Zohrlaut loan of June, 1899, and continued by the Trust Company as parts of either of the two so-called loans of August 2, 1909, they were in fact but parts of one continuous transaction, and that any improper investment by the Trust Company as agent for its clients was committed at the time of such original respective investments only, and that the statute of limitations for the beginning of an action to recover for the liability thus incurred by the Trust Company dates from the period of the original investments and not from the transaction of August 2, 1909, or anything subsequently done.

In June, 1899, Edward Zohrlaut borrowed from the Trust Company $100,000. His obligation to repay the same arose then and there. He then gave evidence of that obligation by his promissory note of $100,000 and secured the same by the pledging of 1,930 shares of the capital stock of the leather company. Successive renewals of such note were made at several times prior to August, 1909, and the pledged stock remained with the Trust Company during all that period as collateral security. Under the well and long settled doctrine of law in this state, each of such renewal notes prior to August, 1909, was, under the evidence in this case, but an extension or continuation of the original obligation rather than successive payments.

There is no evidence in the record to the effect that when the three notes were executed by Edward Zohrlaut on August 2, 1909, and the then existing written evidence of the original obligation, to wit, the then outstanding note of $100,000, surrendered, there was then any express agreement between the Trust Company and Zohrlaut that the original obligation should be canceled, discharged, or considered paid.

We find nothing in the record to warrant a reasonable inference that there was such an express agreement between the debtor and creditor at such time.

It is the long and well settled doctrine in this state that a renewal by the giving of a new note or the extension of time in which to pay a pre-existing debt is not a discharge of the old and original obligation and the creation of a new obligation, but a mere carrying on of the prior obligation, unless and except it appears that the parties agreed that it should be a destruction of the old and the creation of a new obligation. The following among other authorities so declare: *Williams v. Starr,* 5 Wis. 534, 548; *Paine v. Voorhees,* 26 Wis. 522, 526; *Aultman & Co. v. Jett,* 42 Wis. 488, 491; *First Nat. Bank v. Case,* 63 Wis. 504, 510, 22 N. W. 833; *First Nat. Bank v. Finck,* 100 Wis. 446, 452, 76 N. W. 608; *Crocker v. Huntzicker,* 113 Wis. 181, 190, 88 N. W. 232; *Lowry v. Milwaukee Nat. Bank,* 114 Wis. 311, 317, 90 N. W. 178; *Paulson v. Boyd,* 137 Wis. 241, 249, 118 N. W. 841.

The giving of additional security at the time of renewal or extension of time of payment of the pre-existing debt, either by the giving of a note of a third person or in some other form, does not alter the right of the creditor to continue to reap all the benefits to him that may surround the pre-existing obligation and does not relieve the debtor from his original obligation. *Willow River L. Co. v. Luger F. Co.* 102 Wis. 636, 638, 78 N. W. 762; *Bright v. Carter,* 117 Wis. 631, 635, 94 N. W. 645.

The substantial element of the obligation on the part of the debtor Zohrlaut to the creditor Trust Company to repay the $100,000 borrowed June, 1899, was as much present after August 2, 1909, as before. From that time on the written evidence of such obligation was in the shape of three promissory notes aggregating $100,000, rather than as formerly in the shape of one note. His substantial obligation was in no way changed by the giving of the additional

security in the shape of the mortgage on his homestead; it only added to the security to which the Trust Company might resort in case of his default on his primary obligation.

It is immaterial that the Trust Company changed on its books and in the pass-books of its clients the form of its entries as to the situation of such clients towards the loan in question by specifying that as to certain of such clients the collateral security, so far as they were concerned, was to be that of the mortgage alone and as to the others the pledged shares of stock alone. This was a transaction between the Trust Company and its clients and is no part of the transaction between Zohrlaut the debtor and the Trust Company the creditor, and it is the transaction between these two alone that determines such issue.

Having determined that investments by the Trust Company in the Zohrlaut loan could not be considered as giving a right to a new cause of action arising on or subsequent to August 2, 1909, it is still necessary to determine whether any right of action still remains as to the original investment of either of the two items making up the $7,000 involved in that transaction.

The first investment was $4,000, June 19, 1899. That and the subsequent investment in that particular loan were improvident and improper investments by the Trust Company as agent for Williams, and for its negligence in making such investment a cause of action then arose. *Woodard v. Citizens S. & T. Co.* 167 Wis. 435, 437, 167 N. W. 1054. As to the investment of $4,000 in June, 1899, the statute of limitations came into effect as to any right of action for such particular investment on June 19, 1905, and during the lifetime of Williams. Any right to assert a claim on account of such $4,000 by reason of that investment in 1899 is concededly lost and barred, and it was so found by the trial court.

On May 1, 1905, occurred a similar negligent investment of $3,000 in the same Zohrlaut loan. The statute of limitations as to that expired May 1, 1911. Mr. Williams died

April 7, 1911, prior, therefore, to the taking effect of the six-year statute of limitations as to the $3,000 item.

The first sentence of sec. 4234, Stats., viz., "If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced by his representatives after the expiration of that time and within one year from his death," then became applicable to this situation and continued the right existing at the time of Mr. Williams' death to bring such action to his representatives up to and until April 7, 1912. In the meantime and on June 11, 1911, the very Trust Company against which such cause of action existed at the time of Mr. Williams' death became sole executor of the last will of Williams.

At the time the Trust Company undertook to qualify as such sole executor a situation was presented under which the Trust Company was bound in equity to at least do one of the following things: (1) refuse to accept the office of executor and permit the appointment of some one who could in good faith insist upon the enforcement within the proper time of the claim against the Trust Company for its breach of duty as to the investment of the $3,000; or (2) charge itself as such executor with the amounts that should properly be considered as the equivalent of such outstanding claims against the Trust Company on behalf of Williams at the time of his death.

The defendant Trust Company did neither, and remained as sole executor of the Williams estate until after the liquidation proceedings were commenced October 2, 1913.

It is manifest that when the Trust Company did qualify as executor of the estate of Williams and thereafter failed to take any proceedings prior to April 7, 1912, within which time such action might have been brought to enforce or collect such claim, it breached a positive duty it owed under the trust relationship of executor to such estate. For such breach of duty a new and independent cause of action arose

in favor of the estate of Williams, and such new cause of action, starting no earlier at least than June 11, 1911, the time of its appointment, was concededly not barred by any statute of limitations at the time of the filing of the claim for such transaction by the present administrator of such estate.

The estate of Morgan P. Williams, therefore, was entitled to have allowed as a proper claim against the assets of the Trust Company the sum of $3,000, being the amount of the investment in the Zohrlaut loan in 1905 which the Trust Company as executor of the estate had failed to recover for said estate. Interest should be allowed on such sum from April 7, 1912, being the date when, by its failure to act within the statutory period, the right against it for its breach of trust became settled and fixed.

Kaukauna Company Loan.

The Trust Company as agent for Williams invested $16,000 and $2,000 in bonds of the Kaukauna Company April 10, 1906, and November 10, 1907, respectively. These were improvident investments in view of the nature of the securities known to the officers of the Trust Company and for which it could have been held liable. The statute of limitations had not expired as to either of such causes of action for such respective investments at the time of Williams' death, April 7, 1911. Subsequently, on June 11, 1911, the Trust Company was appointed and qualified as sole executor of the will of said Williams. Thereafter and in July, 1912, there was paid by the city of Kaukauna a certain substantial amount on account of these bonds. So that, so far as the original investment was concerned, the Trust Company had realized a substantial amount thereon. Immediately thereafter the Trust Company, in its capacity as executor of said will, breached its duty by failing to see to it that the proportionate share of the payment by the city of Kaukauna on account of such funds was covered into the assets of the Williams estate. Thereupon a cause of

action arose in favor of the estate, as was found by the trial court, and if a claim therefor had properly been filed with the commissioner of banking pursuant to the statute it should have been allowed.

A statement that the plaintiff relies upon this breach of duty occurring in July or August, 1912, upon the payment by the city of Kaukauna on account of the bonds, first specifically appears in the complaint served and presented in January, 1919.

It is urged that, giving the claim as filed by plaintiff in the liquidation proceedings in January, 1914, the fair and reasonable interpretation to which such document is entitled under the liberal rules of construction, the commissioner was reasonably apprised by the filing of such claim that reliance was placed by plaintiff on this cause of action first arising in July or August, 1912, so that upon rejection of the claim the plaintiff was entitled to have such a part of his cause of action so brought under the statute.

We are constrained to hold, however, from an inspection of the claim, the material parts of which are set forth in the statement of facts, that all the references there as to the Kaukauna Company transaction were relative to the original investments and not to the new and independent cause of action which arose by the breach of duty of the Trust Company as executor of the estate of Williams in July and August, 1912. No claim, therefore, having been first filed with the commissioner for his determination, it could not be incorporated below as a new and independent cause of action in the complaint following the commencement of this action by the service of summons in March, 1915. For want, therefore, of a proper foundation in the filing of a claim therefor with the commissioner of banking, there is no support for the allowance by the trial court of any claim based upon the failure of the Trust Company in July and August, 1912, to apply the proportionate share of the payment by the city of Kaukauna to the estate of Williams.

Clark Realty Company Transaction.

The judgment included the sum of $430, with interest from May 1, 1913, for a partial loss resulting in the improvident investment on September 15, 1906, of $1,200 of Williams' money in the Clark Realty Company loan, the details of which are set forth in the above statement of facts.

A cause of action for this improvident investment was an existing one at the time of the appointment and qualification as executor of the Williams estate by the Trust Company in June, 1911. Between that period and the liquidation proceedings of October 2, 1913, no steps were taken by the Trust Company to secure to the estate of Williams anything whatsoever on account of this particular transaction. There was, therefore, at the time of the liquidation proceedings a cause of action existing in favor of the estate of Williams against the Trust Company, and, as we have seen, such liquidation proceedings stopped the running of the statute of limitations thereafter so far as the commissioner of banking could assert the same.

In the claim filed by plaintiff in January, 1914, there is express reference made to this particular investment, although a mistake appears as to the dates of the respective investments in the Clark Realty Company loan. We are satisfied that sufficient appeared in the claim of January, 1914, with reference to this particular transaction of the Trust Company as agent for Williams and of its default as executor so that it might be properly asserted and presented for adjudication in this action. Such portion of the judgment, therefore, as allows this item and interest thereon is affirmed.

By the Court.—Judgment reversed, and the action remanded for modification of the judgment in accordance with this opinion.

SIEBECKER, C. J., and ROSENBERRY, J., dissent.

A motion for a rehearing was denied, with $25 costs, on November 16, 1920.

SHARPE, Respondent, vs. COUSINS, Commissioner of Banking, imp., Appellant.

March 13—November 16, 1920.

Banks and banking: Liquidation by commissioner of banking: Claim not presented to commissioner.

Where a claim filed with the commissioner of banking, engaged in liquidating a trust company, did not mention two transactions relative to improvident investments by the company, and they were not specified until the filing of a complaint, such items could not properly be considered or allowed by the court. *Wisconsin Trust Co. v. Cousins, ante,* p. 486, followed.

APPEAL from a part of a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed and modified.*

This appeal is from a judgment in an action brought by plaintiff within six months after notice of the rejection of a claim theretofore filed by her with the commissioner of banking in the liquidation proceedings of the Citizens Savings & Trust Company.

The transaction involves the investment of $1,000 on October 15, 1909, and of $500 on December 30, 1911, of plaintiff's money by the Trust Company in the Clark Realty Company loan. The nature of this loan is given in the statement of facts in the preceding case, *Wisconsin Trust Co. v. Cousins, ante,* p. 486, 179 N. W. 801.

It was found that there was a loss arising from these investments and the amount of such loss was allowed as part of the judgment below, which judgment included other items not questioned on this appeal.

The plaintiff's claim in the liquidation proceedings was filed within the time fixed by the notice given by the commissioner and before February 26, 1914, and she was notified of its rejection on September 22, 1914. The summons herein was served in March, 1915. An order was obtained for a proposed examination of certain of the then named

defendants and the time extended for the service of the complaint, which was finally served February 11, 1919. From so much of the judgment as allowed damages based upon such two investments in the Clark Realty Company defendant has appealed.

For the appellant there was a brief by *Flanders, Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *George Lines.*

The following opinion was filed July 17, 1920:

ESCHWEILER, J. It is conceded on this appeal that in the original claim filed prior to February, 1914, no mention was made by plaintiff of the two several transactions as to the Clark Realty Company loan, which formed the basis of that portion of the relief granted in the judgment from which appellant has appealed.

The trial court held that the right to relief for such improvident investments of the two items above specified was not outlawed by the statute of limitations at the time of the commencement of this action in March, 1915, and that the two items might therefore be treated as proper subjects for adjudication in this action, although not specified until the filing of the complaint in February, 1919.

This situation is ruled by what has been said in the preceding case of *Wisconsin Trust Co. v. Cousins, ante,* p. 486, 179 N. W. 801, namely, that a cause of action such as this which is permitted under sub. 5, sec. 2022, Stats., for a review by the circuit court of the action and ruling of the banking commissioner in disallowing claims filed with him in the liquidation proceedings, must be confined to such transactions as were originally presented to the banking commissioner in such claim. It cannot include transactions or matters of which the commissioner cannot be held to have

been reasonably apprised by the filing of a claim so that he might exercise his judgment in approving or rejecting the same.

The two items involved here, having never been presented to the commissioner in the shape of a claim in the liquidation proceedings, could not properly be considered by the court in this action although included in the complaint. For that reason the portion of the judgment appealed from must be reversed.

By the Court.—So much of the judgment as is appealed from is reversed, and the action remanded with directions to modify the judgment in accordance herewith.

SIEBECKER, C. J., and ROSENBERRY, J., dissent.

A motion for a rehearing was denied, with $25 costs, on November 16, 1920.

WISCONSIN TRUST COMPANY and another, Executors, etc., Respondents, vs. COUSINS, Commissioner of Banking, imp., Appellant.

March 13—November 16, 1920.

Wisconsin Trust Co. v. Cousins, ante, p. 486, and *Sharpe v. Cousins, ante,* p. 509, followed.

APPEAL from a part of a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed and modified.*

Included in the judgment in the court below was $1,400 damages, together with interest, arising out of an improvident investment made by the Trust Company of $4,000 on November 1, 1907, in one of the Clark Realty Company loans.

A claim was filed in the liquidation proceedings but no mention made therein of this particular item, and the claim

was disallowed and notice thereof given. Summons was served in March, 1915, and similar proceedings taken as in the preceding cases, and a verified complaint containing this particular item was served February 4, 1919.

For the appellant there was a brief by *Flanders, Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

For the respondents there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *George Lines.*

The following opinion was filed July 17, 1920:

ESCHWEILER, J. The same situation is presented on this appeal as in the preceding case of Julia C. Sharpe against the same defendant, and the ruling there and in the preceding case of *Wisconsin Trust Co. v. Cousins, ante,* p. 486, 179 N. W. 801, must control.

There having been no claim for this particular item filed with the commissioner of banking, it could not be properly interposed in the complaint in this action. For that reason the portion of the judgment appealed from must be reversed.

By the Court.—So much of the judgment as is appealed from is reversed, and the action remanded with directions to modify the judgment in accordance herewith.

SIEBECKER, C. J., and ROSENBERRY, J., dissent.

A motion for a rehearing was denied, with $25 costs, on November 16, 1920.

GILBERT, Respondent, vs. COUSINS, Commissioner of Banking, imp., Appellant.

April 10—July 17, 1920.

Banks and banking: Liquidation by commissioner of banking: Claim rejected by commissioner: Complaint: Amendment to incorporate new cause of action.

Where a claim presented to the commissioner of banking, engaged in liquidating an insolvent trust company, specifically referred to improvident investments by the trust company and not to conversion by the trust company of moneys subsequently received on account of such investments, which was a new and independent cause of action, an amendment to the complaint filed after rejection of the claim by the commissioner should not have been allowed. *Wisconsin Trust Co. v. Cousins, ante,* p. 486, followed.

APPEAL from portions of a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed and modified.*

This appeal is as to certain of the items included in a judgment in plaintiff's favor; the first of such items involved being the investment of $4,000 of the plaintiff's money by the Trust Company June 19, 1899, in the Edward Zohrlaut loan No. 371, and the further investment of $300 in the same loan on January 5, 1905. It was found that the rights of action upon these two original investments as improper ones by the Trust Company were barred by the statute of limitations. The total of the two, however, was allowed as being a conversion of her funds by the transaction of August 2, 1909, which transaction is set forth in the preceding case of *Wisconsin Trust Co. v. Cousins, ante,* p. 486, 179 N. W. 801.

The second item was the investment of $1,000 in the bonds of the Kaukauna Company May 10, 1906, a cause of action for such as an original investment being barred by the statute of limitations. It was held, however, that there was a cause of action for failure to properly apply to plaint-

iff's bonds her proportionate share of the payment made by the city of Kaukauna on July 11, 1912, and for such the trial court awarded her damages. The court further ordered upon the two items here involved the payment of the prior dividends of twenty-five per cent. and twenty per cent., previously allowed in the liquidation proceedings, together with interest upon such deferred dividend payments.

The defendant appealed from the portions of the judgment indicated.

For the appellant there were briefs by *Flanders, Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

Charles T. Hickox of Milwaukee, for the respondent.

ESCHWEILER, J. The portions of the judgment appealed from must be reversed by what has been held in the preceding cases, decided herewith (*ante,* pp. 486, 509, 511, 179 N. W. 801, 810, 811).

The cause of action for the improvident investment of plaintiff's funds by the Trust Company in the original Zohrlaut loan was properly held to be barred by the statute of limitations prior to the commencement of the liquidation proceedings, and from what has been held in the preceding cases involving this same subject matter there can be no recovery for any part of such funds based upon the transaction of August 2, 1909, in the Zohrlaut loan.

The cause of action which arose from the improper investment by the Trust Company of $1,000 of plaintiff's money in the bonds of the Kaukauna Company on May 10, 1906, was properly held by the trial court to be barred by the statute of limitations. Recovery was allowed plaintiff for damages arising from what was properly treated as a conversion in July and August, 1912, by the Trust Company of plaintiff's proportionate share of the money paid by the city of Kaukauna upon the bonds of the Kaukauna Company. The original claim filed by plaintiff in the liquidation

proceedings specifically referred, however, to the original investment of May 10, 1906, and claimed relief for such investment, together with interest thereon from May 12, 1912. This claim did not disclose from any express language, nor do we think that a proper inference could be drawn from such claim, that an assertion was made of a right to rely upon what must necessarily be considered as a new and independent cause of action by reason of the conversion in July and August, 1912, of the moneys that were collected by the Trust Company on account of these bonds.

No prior claim, therefore, having been presented to the commissioner of banking in the liquidation proceedings proper for such separate and independent cause of action, it could not properly be made a part of the complaint in this action. The amendment to that effect should not have been allowed, and no relief can be afforded on such cause of action.

By the Court.—So much of the judgment as is appealed from is reversed, and the action remanded with directions to modify the judgment in accordance with this opinion.

SIEBECKER, C. J., and ROSENBERRY, J., dissent.

REINKEY and others, Respondents, vs. WILKINS, Appellant.

September 21—November 16, 1920.

Waste: Action between cotenants: Authority of attorney to appear for absent tenant: Presumption: How to raise question: Judgment in partition suit not bar to action for waste: Res adjudicata: Waste committed after commencement of partition action.

1. The question as to whether a plaintiff has authorized the commencement of an action should be raised by a motion to dismiss instead of by an allegation in the answer; but where such question was disposed of by the trial court as if it had been raised by a motion to dismiss, this court will consider it on the merits.

2. The authority of an attorney to appear for a party is presumed, and the burden of overcoming such presumption is on the party making the denial.
3. Where one cotenant had left his papers with another cotenant, his sister, and had instructed her to protect his interest in proceedings affecting the common property then being considered, the sister had authority four years thereafter, without having seen her brother in the meantime, to authorize an attorney to represent him in an action against a third cotenant for waste.
4. A judgment is a complete bar in a subsequent action between the same parties, not only as to every point actually presented and decided in the former action, but also as to every point which might have been decided and presented therein, when the second action is upon the same cause of action; but when the second action is upon a different claim or cause of action, the former judgment is only a bar as to matters actually presented and litigated therein.
5. Under secs. 3102, 3105, Stats., a judgment in a partition action in which there was no issue as to waste does not estop cotenants from bringing a subsequent action against another cotenant for waste committed during the interval between the commencement of the previous action and the judgment therein.
6. A point or question is in issue in an action so as to be concluded by a judgment therein when an issue concerning it is directly tendered by the pleadings; but a matter which is neither pleaded nor brought into the contest is not in issue although within the general scope of the litigation and although it might have been determined by the judgment if it had been set up and tried.
7. A judgment in partition would not have estopped cotenants from bringing an action against another cotenant for waste committed between the commencement of the partition action and the rendition of judgment, even though the pleadings presented an issue as to waste committed prior to the commencement of such action, where the cause of action as to waste committed subsequent to commencement of the action was not litigated.

APPEAL from a judgment of the circuit court for Pierce county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Waste. The plaintiffs and defendant were tenants in common of certain premises situated in Pierce county, Wisconsin. On the 7th day of July, 1917, the plaintiff *Anna C.*

Reinkey began against the defendant and the remaining plaintiffs an action for partition of these premises. The complaint in the partition suit alleged that one John Wilkins died intestate December 5, 1890, set out the relationship of the parties, the description of the premises, that the lands so described were all the lands in which the parties were jointly interested, and then alleged:

"That during the time this plaintiff and said defendants have owned said premises in common, to wit, since the 29th day of July, 1896, the defendant, *August Wilkins,* has received all rents and profits thereof, amounting to the sum of $320 per annum, as plaintiff is informed and believes, and said defendant, *August Wilkins,* refuses to account to plaintiff for the rents and profits so received and refuses to pay said plaintiff her proper share thereof."

There was the usual prayer for relief, for partition of the premises, and the prayer continued:

"And for such further relief as may be equitable and just, and that the defendant, *August Wilkins,* be required to account for and pay to the plaintiff her share of the rents and profits aforesaid wrongfully detained from her."

In the partition suit the defendant, *August Wilkins,* claimed credit for certain improvements he had made upon the premises, including the building of a house. Upon the trial the defendant, *August Wilkins,* testified that he had cut and removed from the premises timber of the value of approximately $400, and that in early years prior to the commencement of the suit he had cut and removed timber of the value of $100. In the partition suit the court found as follows:

"That the defendant, *August Wilkins,* has had and enjoyed the use and occupation of said premises since the year 1899, during which time, with the knowledge and acquiescence of his cotenants, he has made some improvements thereon; that during such time he has sold some stumpage and timber from said premises to the amount and value of $500."

In the partition suit the lands were ordered sold, an accounting was had in which the defendant, *August Wilkins,* was charged with the value of the timber cut, $500, and credited with the value of certain improvements, and after the deduction of costs the net proceeds were distributed to the various parties to the partition action. The partition suit was tried at the May, 1918, term.

The present action was begun to recover for waste committed upon the premises by the defendant, *August Wilkins,* during the months of September and October, 1917, after the commencement of the partition suit but before the trial thereof. As a defense to this action the defendant alleged that the plaintiffs were concluded by the judgment in partition and filed a plea in abatement, claiming that the action should be abated for the reason that *George Reinkey,* one of the plaintiffs, had not authorized the commencement of the suit. In his answer the defendant alleged:

"That the whereabouts of the plaintiff *George Reinkey* is unknown, that he never authorized the commencement of any action in his name, and that he is not a proper party plaintiff to the action."

The trial court first heard and decided the issue raised by this allegation of the answer, found that *George Reinkey* was a proper party plaintiff, and gave judgment in favor of the plaintiffs for double damages under sec. 3176, Stats., and costs, from which judgment the defendant appeals.

W. G. Haddow of Ellsworth and *F. M. White* of River Falls, for the appellant.

For the respondents there was a brief by *N. O. Varnum* of Hudson and *Francis B. Hart* of Minneapolis, Minnesota, and oral argument by *Mr. Hart.*

ROSENBERRY, J. Two questions are presented upon this appeal: First, Did the court err in refusing to sustain the plea of the defendant to the effect that *George Reinkey* had not authorized the commencement of the suit as to him?

and second, Did the fact that there was a recovery for waste in the accounting had in the partition suit foreclose the claim of plaintiffs against the defendant for waste committed subsequent to the commencement of that action but before its trial? Although the question as to whether or not *George Reinkey* had authorized the commencement of the action was raised by the allegation in the answer instead of by a motion to dismiss, which is the proper procedure, we shall, in view of the fact that the matter was tried and disposed of by the trial court as if it had been a motion to dismiss, consider that question upon its merits. *George Reinkey* appeared in this suit by his attorney. The authority of an attorney to appear for a party is presumed in this state, and the burden of overcoming this presumption is upon the party making the denial. *Thomas v. Steele,* 22 Wis. 207; *Schlitz v. Meyer,* 61 Wis. 418, 21 N. W. 243; *Andrews v. Thayer,* 30 Wis. 228. Upon the trial the attorney appearing for the plaintiff confessed that he had no authority to appear for him excepting such as he had by reason of a request made that he so appear by *Anna Reinkey,* another plaintiff and a sister of the plaintiff *George Reinkey.* The only testimony offered to show the authority of *Anna Reinkey* to procure the appearance of the attorney for *George Reinkey* was a conversation had with her brother some three or four years before. She testified that she was a sister of *George Reinkey;* that she last saw her brother about four years ago; that she had talked with him about his interest in his grandfather's estate, consisting principally of the lands involved in the partition suit, and his rights therein; that he left his papers with her and asked her to look after his interests; that prior to that time there had been talk of commencing legal proceedings in respect thereto; that he was anxious to secure the money that was coming to him, and that her brother asked her to protect his interest in the proceedings the same as if he were present. The trial court held this sufficient to constitute *Anna Reinkey*

the agent of *George Reinkey* for the purpose of procuring the appearance of an attorney to represent him in this action, and we are of the opinion that the trial court correctly ruled in so holding. *Will of McGinty,* 171 Wis. 184, 176 N. W. 850, was a very different case. There the attorneys for one Bagley had not taken appeal within the time fixed by law. The question was whether the circuit court should, in the exercise of its discretion, extend the time. The trial court refused to extend the time, and this court held that in so doing the trial court did not abuse its discretion. It appears the decision of the trial court would have been the same even if the authority of Bagley's attorneys had been admitted. Second, it is the contention of appellant that, because the plaintiffs failed to litigate the liability of the defendant for the acts of waste committed after the commencement of the partition suit and before its trial, they are estopped from maintaining this action on the ground that the plaintiffs are concluded not only as to all matters actually litigated upon the former trial but also upon all matters which might have been litigated therein, an accounting for waste committed prior to commencement of the partition having been made in that action.

The rule upon this proposition is:

"A judgment is a complete bar in a subsequent action between the same parties, not only as to every point actually presented and decided in the former action, but also as to every point which might have been presented and decided therein when the second action is upon the same cause of action; but when the second action is upon a different claim or cause of action, the former judgment is only a bar as to matters actually presented and litigated therein." *Huntzicker v. Crocker,* 135 Wis. 38, 115 N. W. 340; *Rahr v. Wittmann,* 147 Wis. 195, 132 N. W. 1107; *Harrison v. Remington P. Co.* 140 Fed. 385; *S. C.* 5 Am. & Eng. Ann. Cas. 314, and note.

The complaint in the partition suit contained no allegation whatever with reference to the matter of waste. Sec. 3102,

Stats., provides what the complaint in a partition action shall state. No mention is made therein of waste. Sec. 3105, Stats., provides that:

"In all actions for partition the court may investigate and determine all questions of conflicting or controverted titles, quiet title, remove clouds in titles, assign dower and homestead, apportion incumbrances, adjust claims for improvements or for rents and profits; . . ."

The claim of estoppel made here by the defendant must fail. First, the action for waste is upon a different cause of action; second, the issues are not identical; and third, it is conceded that the subject matter of this action was not in fact litigated in the former action.

A point or question is in issue in an action in such a sense that it will be concluded by the judgment therein when an issue concerning it is directly tendered by the pleading in the case. *New Orleans v. Fisher,* 180 U. S. 185, 21 Sup. Ct. 347; cases cited 23 Cyc. 1302, note 12. A matter is not in issue in an action which is neither pleaded nor brought into contest therein, although within the general scope of the litigation and although it might have been determined by the judgment if it had been set up and tried. *Abendroth v. Van Dolsen,* 131 U. S. 66, 9 Sup. Ct. 619; *Montpelier S. B. & T. Co. v. School Dist.* 115 Wis. 622, 92 N. W. 439; *Wilson v. Hoffman,* 93 Mich. 72, 52 N. W. 1037.

The pleadings in this case presented no issue whatever as to waste, and even had the pleadings presented an issue as to waste committed prior to the commencement of that action the plaintiffs would not have been concluded as to this cause of action, which arose after the commencement of the former action, unless it had in fact been litigated in the former action. The trial court correctly held that the plaintiffs were not estopped.

By the Court.—Judgment affirmed.

MATSON and wife, Respondents, vs. DANE COUNTY, Appellant.

September 22—November 16, 1920.

Highways: State trunk system: Liability of county for improper construction: Negligence: Governmental or proprietary capacity: Creation of nuisance: Pleading: Single primary right: Multiplicity of causes of action.

1. Where the facts stated in several causes of action in a complaint all show a breach of the same primary right for which recovery is sought, they state but a single cause of action, though they may show minor matters constituting independent grounds for relief.
2. Where the complaint sought recovery for the death of plaintiffs' children, resulting from alleged wrongful acts of defendant, separate causes of action for the same relief on the same facts, basing the right to recover on various grounds, state only a single cause of action, and demurrers should have been sustained as to each of the causes of action except the first.
3. Under sec. 1317, Stats., requiring each county to maintain state trunk highways within the county, sub. 5 of which authorizes claims for damages due to the insufficiency of the trunk system to be against the county, counties are placed in the same relation and have the same legal duties respecting the maintenance of the state trunk highways and liability for defaults in the performance of such duties as were formerly imposed on towns, cities, and villages.
4. While the maintenance of a state trunk highway by a county may be a governmental function with regard to the rights of the public traveling thereon, it is not such a function with respect to injuries thereby occasioned to the owners of the adjoining property. As to them, the county acts in a proprietary capacity and is liable for injuries resulting from its acts.
5. A complaint by tenants occupying land along a highway that a culvert thereunder had been improperly constructed so as to erode a portion of the land occupied by plaintiffs and create a water-hole, which appeared to be a mere pond but which was in fact a dangerous trap, especially attractive to children, and that plaintiffs' children fell into the water-hole and were drowned, states a cause of action in favor of the plaintiffs for the alleged injury.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed in part; reversed in part.*

This action was brought by plaintiffs to recover for the death of their two children. The children were drowned in a water-hole on the premises of Mary Connor, adjoining a state trunk highway in the town of Windsor in *Dane County.* Plaintiffs claim ten separate causes of action, namely: (1) Private nuisance; (2) unlawful obstruction and diversion of the flow of water; (3) unlawful removal of lateral support; (4) failure to repair after notice of defect and the result thereof; (5) negligence. The second five causes of action are the same as the first five, respectively, except that it is not alleged that the water-hole was in a watercourse.

Appellant entered a general demurrer to each of the ten causes of action and the court overruled the demurrer as to the first, second, third, sixth, seventh, and eighth causes of action, and sustained the demurrer to the fourth, fifth, ninth, and tenth causes of action. The defendant appeals from the order of the court overruling the demurrers to the above mentioned causes of action. The plaintiffs have given notice under sec. 3049*a,* Stats., for a review of that part of the order sustaining the demurrer to four of the ten causes of action.

Roman Heilman, district attorney of Dane county, for the appellant.

F. M. Wylie of Madison, for the respondents.

SIEBECKER, C. J. A preliminary question of pleading arises upon the allegations of the complaint. The pleader has set out the facts constituting the subject of controversy upon which relief is demanded. If the pleader had not attempted to repeat these facts after treating them as the first cause of action, in an attempt to allege nine additional causes of action, the subject would not have challenged our attention. The circuit court deals with the ten separate

demurrers interposed to the ten alleged causes of action, sustaining the demurrers to the fourth, fifth, ninth, and tenth alleged causes, and overruling the remainder. The record does not indicate that the question whether the facts alleged constitute different causes of action was brought to the attention of the court for consideration. It seems to us that the complaint as framed should not receive the approval of tacit consent by passing it without taking note of the subject. Sec. 2646, Stats., provides that:

"The complaint shall contain: . . .

"(2) A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition.

"(3) A demand of the judgment to which plaintiff supposes himself entitled."

There is but one object sought in bringing this action, namely, to enforce the primary right of the plaintiffs for the injury proximately caused by the default of the defendant's officers and servants in performing a duty imposed on them by law. A mere repetition of a statement of facts in a complaint, upon a theory that it constitutes a basis of relief for breach of the primary right alleged as the ground of action, does not, in any sense of the Code, constitute an independent cause of action. There is but one subject of action set out in the complaint as above indicated and all the so-called separate causes of action are parts of that subject, involving the breach of a primary right and the injury it caused plaintiffs. *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921.

As declared in *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229:

"The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented."

An examination of the entire complaint discloses that

facts are stated as independent grounds for relief, yet when considered in view of the object of the action they set forth but one primary purpose, to which they all relate and for which relief is sought, namely, to redress the plaintiffs' injury, proximately caused them by the breach of this right.

"There may be many minor subjects, and facts may be stated constituting independent grounds for relief, . . . and there be still but a single primary purpose of the suit, with which all the other matters are so connected as to be reasonably considered germane thereto,—parts of one entire subject, presenting to the court but one primary ground for invoking its jurisdiction. That was the rule before the Code, and it was preserved thereby in unmistakable language, as this court has said on many occasions." *Herman v. Felthousen,* 114 Wis. 423, 90 N. W. 432, citing *Bassett v. Warner,* 23 Wis. 673, and other cases on p. 426.

Applying this rule to the complaint in this case, it is manifest that the pleader wholly misconceived the purport and facts alleged in the complaint in construing them as constituting ten different causes of action. In their scope, purpose, and object the facts stated constitute but one cause of action within the provisions of the Code, and hence the alleged nine causes of action, after the first, do not constitute separate causes of action, and the demurrers thereto must be sustained.

It is contended by the defendant that the county is not liable for the alleged default in building and constructing the culvert described in the complaint as crossing the state trunk highway in question. By sub. 1(a), sec. 1317, Stats., it is provided that

"On and after May 1, 1918, each county shall adequately maintain the whole of the trunk system lying within the county in accordance with the directions, specifications, and regulations made for such maintenance by the commission."

Other provisions of this section prescribe the manner and extent in which such roads are to be maintained by the counties, the payment of the actual cost thereof into the

county treasury out of the state trunk highway appropriation; and sub. 5 provides:

"Claims for damages which may be due to the insufficiency or lack of repair of the trunk system shall be against the county, and sections 1339, 1340, and 1340d of the statutes shall apply to such claims."

But instances where the unsafe and dangerous condition was caused by a town, city, or village, or a public-service corporation are excepted, in which event such corporation causing the defect shall be liable for such claim. These provisions clearly indicate that counties are placed in the same relation and have imposed on them the same legal duties respecting the maintenance of the state trunk highways and liability for defaults in the performance of such duties as were imposed on towns, cities, and villages prior to these statutes. It is obvious that this legislative policy carries with it the legal obligations that arise out of the relation created by the statutes imposing these burdens on counties, and that in case of a breach thereof the county is liable to the persons injured thereby to the same extent as towns, cities, and villages were liable for such defaults before the enactment of these statutes. It naturally follows that the legal remedies appropriate to enforce redress for breaches of such duties by counties are available to parties to enforce their claim against counties.

It is averred in behalf of the county that the alleged cause of action charges a default by the county in its discharge of a governmental function and that therefore no legal liabilities exist therefor. The claim of the county rests on the proposition that what the county's officers and agents may do in discharge of its duty in maintaining a public highway are acts in discharge of its governmental duty and the law imposes no legal liability for the injuries or damages caused thereby, regardless of the manner in which such duty is performed, unless the legislature has created a liability in such cases. The proposition asserted as controlling in

this case is not sustained by the adjudications in this court. In the case of *Folk v. Milwaukee,* 108 Wis. 359, 84 N. W. 420, this court, in speaking of the doctrine of nonliability of a city in its discharge of a governmental function, states:

"We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or *negligently* turn water or sewage upon the lands of another, without liability." *Gilluly v. Madison,* 63 Wis. 518, 24 N. W. 137; *Hughes v. Fond du Lac,* 73 Wis. 380, 41 N. W. 407; *Schroeder v. Baraboo,* 93 Wis. 95, 67 N. W. 27.

These cases all go upon the principle that the city cannot, in the management of its corporate property, create a nuisance injurious to the property or the rights of others. In none of the cases were the city officers who were guilty of negligence or wrongful acts acting in a governmental capacity towards the person injured. In *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448, where the city, in grading and improving a street, caused the filling to extend beyond the street limits upon adjoining property, it was urged that the city, while engaged in this governmental function of improving the street, though it acted beyond its corporate duty in invading the adjoining property, was not liable for such wrongful act. In this case the court held:

"In grading the street the city was doing one of the things which, as a municipal corporation, it was authorized to do. That work was done in an improper or negligent manner, so as to invade the rights of the plaintiffs, not as a member of the public, *but as adjoining proprietors. Toward them the city's act was not governmental, but proprietary.* For proximate damages thus caused liability results according to principle, and without conflict of authority." Citing cases of this court on p. 54.

In *Harper v. Milwaukee,* 30 Wis. 365, the city was held liable upon the ground of maintaining a nuisance by an

overflow of water from the street onto adjoining premises and injuring the premises and destroying the owner's merchandise thereon, the overflow being caused by a negligent filling of the gutter with earth and permitting it to remain there for an unreasonable length of time. The court there declares that:

"The general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible, in any case in which, under like circumstances, an action could be maintained against an individual."

The decisions of this court fully sustain the principle that, while a municipality is not held liable for damages resulting from mere performance of governmental functions, such exception applies only when the city's relation to the injured person is governmental, such as a traveler on the highway, but not when its relation to the injured one is that of a proprietor.

"In respect to the rights of adjoining proprietors, the laying out of streets and the opening and preparing of them for public use and travel are municipal functions, within the corporate duties of municipalities, as distinguished from their purely public or governmental duties, imposed on them as agents of the government." *Damkoehler v. Milwaukee,* 124 Wis. 144, 101 N. W. 706; *Spelman v. Portage,* 41 Wis. 144; *Gilluly v. Madison,* 63 Wis. 518, 24 N. W. 137; *Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280.

The gravamen of the complaint is that the defendant negligently adopted an inadequate and defective plan for the construction of a culvert on the trunk highway in question for the passage of the water in an ancient watercourse, and that the agents and servants of defendant negligently and carelessly executed this plan of constructing such culvert, which caused the water passing through it to create a deep gully and hole at the outlet of said culvert and thereby

caused the lateral support of the land of the adjoining farm of Mary Connor, which plaintiffs occupied as tenants, to be removed, and that the water, by erosion, produced a "hole several feet wide, several feet long, and several feet deep; . . . that thereby the end of the said culvert was undermined and portions of the said culvert broken off and torn away, and the said highway and the said culvert brought into a state of disrepair dangerous to said adjoining premises; that the said culvert was in the said state of disrepair a nuisance; that at times no water flowed in the said watercourse, and the said hole was at such times filled with opaque muddy water, appeared to be but a shallow mud-puddle, and was a dangerous trap and a nuisance, and was especially attractive to children." It is charged that these dangerous conditions existed for a long time prior to June 17, 1919, while plaintiffs were occupying the said Connor farm as tenants, and that on this date the plaintiffs' two children, without any fault on plaintiffs' part, fell into the hole or trap and were drowned. The foregoing facts, in connection with the other facts stated in the complaint, sufficiently charge the creation of a dangerous trap or nuisance on these premises occupied by the plaintiffs as tenants. The dangerous condition thus created on the land adjoining the highway is in the nature of a pitfall and snare, liable to injure persons going onto the premises. The plaintiffs and their children were lawfully on the premises as tenants and were entitled to use them as if they were free from such pitfalls and traps unless they had actual or constructive knowledge of their existence. It is considered that the facts and circumstances alleged in the complaint state a good cause of action in plaintiffs' favor for the alleged injury. *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664. The court properly sustained the demurrer to the fourth, fifth, ninth, and tenth alleged causes of action. It was error to overrule the demurrers to the second, third, sixth, seventh, and eighth alleged causes of action. The cause must be remanded to

the circuit court with direction to enter an order overruling the demurrer to the first cause of action and sustaining the demurrer to the remaining nine alleged causes of action.

By the Court.—It is so ordered. Neither party to recover any costs in this court. The respondents to pay the fees of the clerk of this court.

ESTATE OF LEU: LEISER, Special Administratrix, Respondent, vs. PAGEL, Executrix, Appellant.

September 22—November 16, 1920.

Executors: Claims against estates: Oral agreement to devise land: Validity: Recovery for services: Limitation of actions: When action accrues: Claim filed after time limited: Amendment: Personal estate of deceased: Transfer of title.

1. The title to personal property does not pass from a deceased person without administration of the estate and a due assignment of property by the personal representative; and heirs as individuals have no right of action for services rendered by their ancestor, such right being in the administrator.
2. A claim filed against an estate by the heirs as individuals could not be amended, after the expiration of the statutory period for the presentation of claims, by making it a claim by the ancestor's administratrix.
3. Where services are rendered on the promise of compensation in the form of a legacy, the time of payment is postponed until the death of the promisor, and the cause of action does not arise in favor of the party rendering the services until such death.
4. An oral promise to compensate for services by a devise of real estate in whole or in part is void and can be resorted to for no purpose except to rebut the presumption, where it exists, that the services were gratuitously rendered; and a cause of action accrues when the services are rendered. *Estate of Kessler,* 87 Wis. 660, overruled.
5. After the time limited for filing claims against the estate of C. L. had expired a special administratrix was appointed for one A. L., who filed a claim for services rendered C. L. by A. L. under a promise to devise real estate. *Held* that, the cause of action having accrued during the lifetime of

A. L., the claim is barred because not filed within the time limited. *Barry v. Minahan,* 127 Wis. 570, followed.

6. Recovery cannot be had for services rendered to a decedent more than six years prior to his death, pursuant to a void promise to devise real estate, where payments have not been made so as to constitute a mutual account.

APPEALS from a judgment of the county court of Sauk county: JAMES H. HILL, Judge. *Reversed.*

Charles Leu died testate August 18, 1919, leaving an estate valued at $2,369.71, which, by the terms of his will executed eight days before his death, he bequeathed to his only daughter, *Minnie Pagel.* Charles Leu was twice married, and *Minnie Pagel* is a daughter by his first wife. After the death of his first wife he married a Mrs. Schroeder, who had adopted two nieces, one of whom was Amelia Leiser, mother of the plaintiff.

For many years Charles Leu and his second wife lived together upon a small piece of land in the outskirts of the village of Wonewoc, Juneau county, but about 1911 sold this real estate and purchased a small place near Baraboo, Sauk county, Wisconsin, where they resided until the death of his second wife in February, 1919.

From 1904 and up to March, 1918, the said Amelia Leiser performed work, labor, and services for the said Charles Leu and wife and expended sums of money for railroad fare in going from her home in Pittsville, Wood county, Wisconsin, at the special instance and request of said Mr. and Mrs. Charles Leu, in reliance and upon the express promise upon the part of the said Mr. and Mrs. Charles Leu that they would compensate her for her said services by devising and bequeathing to her all their property, both real and personal, as compensation for her services and disbursements.

Amelia Leiser died in December, 1918. Mrs. Leu died in June, 1919, and Charles Leu died on the 18th day of August, 1919. His will was duly admitted to probate, letters testa-

mentary issued thereon, and the time for filing claims against the estate was limited to January 6, 1920. On January 5, 1920, Charles Leiser, husband of deceased Amelia Leiser, and his children, as individuals, filed a claim against the estate of Charles Leu for $1,500 on account of services so rendered by Amelia Leiser, during her lifetime, to the testator. This claim was objected to, and thereafter, on May 10, 1920, *Hilda Leiser,* as special administratrix of the estate of Amelia Leiser, deceased, filed a claim against the estate of Charles Leu, deceased, in the amount of $1,643.80 for the same services. It seems that this claim was filed as an amended claim or an amendment to the claim filed by Charles Leiser and his children January 5, 1920.

The county court held that Mrs. Leiser had rendered services to Mr. and Mrs. Charles Leu, both jointly and severally, upon their promise that she would receive upon their death all of their property, both real and personal, in compensation therefor; that the agreement, being one to devise real estate in payment of services, was void under the statute of frauds, but that the claimant might recover upon implied contract the reasonable value of such services, and rendered judgment for the value of the services rendered by said Amelia Leiser within six years prior to her death. From the judgment so rendered the executrix of the estate of Charles Leu brings this appeal. A cross-appeal was also taken by the plaintiff from that part of the judgment disallowing the value of services rendered more than six years prior to Amelia Leiser's death.

The cause was submitted for the appellant *Pagel* on the brief of *Grotophorst, Thomas & Quale* of Baraboo, and for the respondent *Leiser* on that of *Bentley, Bowler & La Mar* of Baraboo.

OWEN, J. It is well settled in this state that the title to personal property does not pass from a deceased person to his heirs or any one else without administration of such

person's estate and a due assignment of the property by the personal representative of the deceased. *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489; *Buttles v. De Baun,* 116 Wis. 323, 93 N. W. 5. It follows that Charles Leiser and his children, as individuals, had no right of action against the estate of Charles Leu to recover for the services rendered by Mrs. Leiser during her lifetime.

The time for filing claims against the estate of Charles Leu was limited to January 6, 1920. On May 10, 1920, the administratrix of the estate of Amelia Leiser filed a claim against the estate of Charles Leu in the nature of an amendment to the claim filed by Charles Leiser and his children on the 5th day of January, 1920. It is apparent that the claim filed January 5, 1920, could not be thus amended so as to make a valid claim of it, nor to save the claim filed May 10th from the bar of the statute of limitations. The court properly treated the claim filed by the administratrix on May 10th as an original claim, and the question arises whether the claim could be filed in the manner it was after the time limited for presenting claims against the estate.

Appellant contends that the claim was barred by sec. 3844, Stats., which provides:

"Every person having a claim against a deceased person, proper to be allowed by the court, who shall not after notice given as required by sections 3840 and 3840*m*, exhibit his claim to the court within the time limited for that purpose, shall forever be barred from recovering such demand or from setting off the same in any action."

The county court held that the claim was saved from the bar of said sec. 3844 by sec. 3860, Stats., which provides:

"If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims the person having such claim may present it to the county court and prove the same at any time within one year after it shall accrue or become absolute."

The question arises whether this claim accrued before the 6th day of January, 1920, the date limited for the filing of claims against the estate.

In *Barry v. Minahan,* 127 Wis. 570, 107 N. W. 488, it was held that sec. 3860 did not apply to a claim existing against the deceased at and before his death, and did not save such claim from the bar of sec. 3844. In that case the time for filing claims against the estate of John Minahan, deceased, expired on the 6th day of January, 1902. Catherine Minahan, his wife, died in 1893. The executrix of her estate was appointed in February, 1904, and promptly filed a claim against the estate of John Minahan to recover the sum of $850 which it was claimed Catherine loaned to her husband about one year prior to her death. Objection was made to the allowance of the claim on the ground that it had not been presented against the estate within the time required by law, which expired January 6, 1902. The county court disallowed the claim, and on appeal to the circuit court the judgment of the county court was reversed, the circuit court holding that the claim did not accrue until the appointment of the administratrix February 18, 1904. This court held that the cause of action set up in the petition and claim filed existed in favor of Catherine Minahan and was capable of being enforced by her for a period of about a year before her death and was during such time a good, valid, and existing cause of action which she had a right to enforce. The situation was distinguished from that of *Stehn v. Hayssen,* 124 Wis. 583, 102 N. W. 1074, where the cause of action did not arise until after death, and there it was held that a cause of action which arises after death does not accrue until there is some person in existence who can bring it, and that there is no person in existence to bring an action in favor of the estate of the deceased person which arose after death until an executor or administrator is appointed.

So in this case it is necessary to determine whether a

cause of action accrued in favor of Mrs. Leiser prior to her death. If so, then upon the authority of *Barry v. Minahan, supra,* the claim of the administratrix filed against the estate of Charles Leu on May 10th was barred and the action cannot be maintained.

The law undoubtedly is that where services are rendered upon the promise of compensation in the form of a legacy, the time of payment is postponed until the death of the promisor, and the cause of action does not arise in favor of the party rendering the services until that event. *Bayliss v. Estate of Pricture,* 24 Wis. 651; *Jilson v. Gilbert,* 26 Wis. 637; *Murtha v. Donohoo,* 149 Wis. 481, 134 N. W. 406, 136 N. W. 158. But where there is an oral promise to compensate by a devise of real estate in whole or in part, the agreement is utterly void and can be resorted to for no purpose except to rebut the presumption, where it exists, that the services were gratuitously rendered. *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439; *Loper v. Estate of Sheldon,* 120 Wis. 26, 97 N. W. 524; *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229; *Nelson v. Christensen,* 169 Wis. 373, 172 N. W. 741. These cases firmly establish the principle that the cause of action accrues when the services are rendered, as in other cases of implied contract, and the person rendering such services may maintain an action upon them at any time. In such an action the defense that the services were to be compensated by the devise of real property, in whole or in part, would not be available, as attorneys for claimant seem to think, for the reason that such contract, promise, or agreement is wholly void within the statute of frauds.

It is true that *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129, is not in harmony with the subsequent cases above cited. In *Taylor v. Thieman, supra,* Chief Justice WINSLOW, writing for the court, attempted to point a distinction between the *Kessler Case* and the subsequent cases on the ground that in the *Kessler Case* the services were continued up to

the time of the death of the promisor. This circumstance furnishes no real distinction, because whether the services were rendered continuously up to the time of the death of the promisor makes no difference. Upon the principle now firmly established in this court, the bar of the statute runs on all services rendered more than six years prior to the death, where payments have not been made so as to constitute a mutual account, as was the case in *Laughnan v. Estate of Laughnan,* 165 Wis. 348, 162 N. W. 169. The fact is that the decision in the *Kessler Case* was grounded on an entirely different principle. It was there held that the action on implied contract did not accrue until the death of the intestate, and that until such time the claim rested in a void contract, becoming a money demand only upon the death of the promisor and his failure to carry out the terms of the contract, within the doctrine of *Tucker v. Grover,* 60 Wis. 240, 19 N. W. 62. Under the doctrine of that case Mrs. Leiser could not have brought an action in her lifetime to recover for the value of the services rendered by her. Her cause of action would not have accrued until the death of Mr. and Mrs. Leu. The decision in the *Kessler Case* has not, however, been followed and is contrary to all of the subsequent cases above cited, the doctrine of which is that the claim for compensation rests entirely upon an implied contract, and that a cause of action to recover therefor accrues as soon as the services are rendered, entirely unaffected by the fact that they were rendered pursuant to a promise to devise real estate either in whole or in part.

It follows that up to the time of her death Mrs. Leiser might at any time have maintained an action to recover for the value of the services rendered by her not barred by the six years' statute of limitations, and under the authority of *Barry v. Minahan, supra,* the claim for such services having accrued before the death of Charles Leu should have been filed against his estate within the time fixed for the filing of claims. Not having been filed until May 10th, more than

four months after the time limited for the filing of claims against his estate, it is barred by sec. 3844, Stats., and should have been wholly disallowed.

By the Court.—Judgment reversed, and cause remanded to the county court with instructions to enter judgment wholly disallowing the claim.

HOWE, Respondent, vs. COREY, Appellant.

September 24—November 16, 1920.

Automobiles: Invited guests: Liability of driver for negligence: Contributory negligence.

1. A guest in an automobile who, knowing that the automobile was approaching a railroad track at an excessive rate of speed, failed to remonstrate with defendant, the owner and driver, as to the danger of crossing the track at such speed or to ascertain whether he was keeping a proper lookout, is guilty of contributory negligence barring recovery for injuries received by him. [The question of the liability of a gratuitous carrier to his invited guest in the absence of contributory negligence of the guest, not determined.]
2. Generally a passenger in an automobile is required to use the same care for his safety that a reasonably careful person exercises under the same or similar circumstances, the extent to which he may rely on the driver for his protection against danger depending on the circumstances of the particular case.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Reversed.*

This action was brought by plaintiff to recover damages for injuries alleged to have been inflicted through negligence of the defendant in driving an automobile in which plaintiff was riding.

Plaintiff was injured on December 5, 1917, at about 8 p. m., in a collision between an automobile owned and driven by defendant, in which plaintiff was riding as an invited guest, and a train of cars extending across Belknap street in

the city of Superior. Belknap street is a straight street extending in an easterly and westerly direction for about two miles in the city of Superior. About five blocks from its easterly end it is intersected by the Soo line tracks leading to the Soo line station. Immediately adjacent to the south of the intersection are the yards of the company. The evening of the collision was a clear, cold one, with the thermometer registering around zero. It appears that the automobile lights were in a poor condition and that the windshield was "frosted," of which conditions plaintiff and defendant were apprised; that as they drove on Belknap street plaintiff and defendant refrained from talking together, except casual remarks; that the defendant was keeping no lookout for obstructions, and that the car was being driven at a reckless rate of speed; that the automobile and train collided so violently that the automobile was wedged between the cars with such force that the train had to be broken apart before the automobile could be extricated; that plaintiff was severely injured by the collision. The plaintiff alleges both gross and ordinary negligence on the part of the defendant, and that he (plaintiff) was not guilty of contributory negligence. The defendant denies the negligence and that plaintiff was free from contributory negligence.

By a special verdict the jury found that the defendant was guilty of ordinary negligence and that the plaintiff was not guilty of contributory negligence. Judgment was entered awarding plaintiff damages in the sum of $2,500 and costs, from which judgment defendant appeals.

For the appellant there was a brief by *Pickering & Rieser* of Superior, and oral argument by *R. M. Rieser.*

For the respondent there was a brief by *Dietrich & Dietrich* of Superior, and oral argument by *H. W. Dietrich.*

SIEBECKER, C. J. The question of the liability of a gratuitous carrier to his invited guest is presented and fully discussed in briefs of counsel. It appears that there is

some diversity of opinion expressed in the adjudications on this subject in other jurisdictions and that the question has not heretofore been considered by this court. In the view we take of this case a decision of this question is not necessary for a complete determination of the legal rights of the parties, and we therefore choose not to pass opinion on this question in disposing of the case. We are of the opinion that the record clearly establishes that the plaintiff is not entitled to recover in this case for the reason that it appears as a matter of law that his acts and conduct establish his negligence, which proximately contributed to produce the collision between the automobile and railroad train which caused the injuries and consequent damages he complains of. It is the general rule that a passenger in an automobile is required to use the same care for his safety that a reasonably careful person exercises under the same or similar circumstances. The fact that he has not charge of the automobile as driver does not absolve him from exercising care for his safety, though he is not required to exercise the same care that is required of the driver. The extent to which a guest may rely on the driver for his protection against danger must in a measure depend upon the circumstances of the particular case.

"In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and, being so aware, fails to warn or admonish the driver or to take proper steps to preserve his own safety." *Carnegie v. G. N. R. Co.* 128 Minn. 14, 150 N. W. 164.

"Ordinarily it is not the province or even proper for a guest to attempt to direct the movements of the driver. The situation may be different when he knows that the

driver is operating the machine in a careless manner, or if he has knowledge of some danger which is not known or obvious to the driver." See cases in Huddy, Automobiles (5th ed.) sec. 690.

Negligence of a guest may be inferred from action or omission to act, speaking or omitting to speak, respecting the duty under all the circumstances. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a reasonably prudent person would under like circumstances. *White v. Portland G. & C. Co.* 84 Oreg. 643, 165 Pac. 1005; *Brommer v. Pennsylvania R. Co.* 179 Fed. 577, 29 L. R. A. N. S. 924; *Avery v Thompson,* 117 Me. 120, 103 Atl. 4. The plaintiff in the instant case testifies frankly on the subject of the trip in defendant's automobile on the evening in question. He states that he and defendant are intimate friends; that he has ridden with defendant in his car considerably; that on the evening in question they met about 6 o'clock and had some drinks and lunched together until about 8 o'clock, when defendant proposed that plaintiff take a ride with him to show off his new car; that they went to the garage and got into the car and started on their way to Belknap street; that the top was down, that the headlights were somewhat dim; that the windshield became frosted soon after starting, it being a cold winter evening, the thermometer registering about zero or a little lower; that he wore glasses and his eyesight was not good. As to the manner of driving on this trip plaintiff testifies:

"We went up John avenue to Belknap street and turned east on Belknap. A change was made in the speed of the car after we got on Belknap; the speed was gradually increased for a period of two or three blocks up to Hammond, which may be twelve blocks west of the Soo tracks. From there on until the time of the accident I think we kept about steady speed from that time on. I think I can tell from experience what speed we were going. I think he was going at least fifty miles an hour up to the time of the

collision. I did not observe the train on the Soo track until we were right on top of it. . . . I think I mentioned to him about the speed the car was going, that we was going pretty fast. I was not watching out for obstructions in the roadway. I was taking no part in the operation of the car, because it was cold and having my head over that way [indicating] to sort of break the wind. I didn't think there was any wind apart from what the car made."

On cross-examination the plaintiff stated that he did not know that the defendant heard him when he spoke to him about the car going "pretty fast;" that this remark was made shortly after turning onto Belknap street; that thereafter he neither said nor did anything about driving so fast.

As to his familiarity with Belknap street and the railroad crossing, he testifies that he had driven on Belknap street and knew the Soo track.

"I think I knew just as much about the presence of the tracks across Belknap street, the use that was made of them, the night and day switching, and those facts that have been testified to here, as *Mr. Corey* did. I think I was just as familiar with them as he was. Now as we approached the Soo line tracks at this tremendous rate of speed it never occurred to me again to call the danger to *Mr. Corey's* attention or to see that he heard me. . . . As we drove along Belknap street I kept no lookout myself; making myself as comfortable as I could, and let *Corey* drive along at a speed that would suit him. As we approached the crossing I did not give it and the probability of a train being there any consideration at all. I paid no attention to see whether *Corey* was watching for it or not."

The facts, circumstances, and conditions thus disclosed and the other evidence in the case show without dispute that the plaintiff, to all intents and purposes, acquiesced in the manner the car was being driven by *Corey* and that he did nothing to protect himself from the imminent dangers in approaching the Soo tracks crossing in the manner they did, and of which he was as fully apprised as *Corey*, nor did he do anything to ascertain whether or not *Corey* was keep-

ing a lookout for these dangers. To permit *Corey* to proceed in this reckless manner without remonstrance, in the light of plaintiff's knowledge of the probable dangers at the Soo crossing, amounts to acquiescence in *Corey's* conduct and an assumption of the hazards and dangers incident thereto. It is wholly inconsistent with the idea that he exercised such reasonable care as the ordinarily prudent person exercises under like or similar circumstances. There is but one inference permissible to be drawn from the facts shown by the evidence, namely, that plaintiff was guilty of a want of ordinary care on the occasion in question and that such want of care contributed to produce the injury complained of. *Fair v. Union T. Co.* 102 Kan. 611, 171 Pac. 649; *Jefson v. Crosstown St. Ry.* 72 Misc. 103, 129 N. Y. Supp. 233. It is considered that the court erred in not awarding judgment to dismiss plaintiff's complaint.

By the Court.—The judgment is reversed, and the cause remanded with direction to dismiss plaintiff's complaint.

BARBER, Plaintiff in error, vs. THE STATE, Defendant in error.

September 25—November 16, 1920.

Criminal law: Assault with intent to rape: Evidence: Declarations of defendant as to purpose: Remoteness: Statements of wife out of presence of defendant: Private communications of husband and wife.

1. In a prosecution for assault with intent to rape, evidence that defendant said that if his wife was ever gone he would "try out" the prosecuting witness (who lived in his home) to see if she was sporty, and that she would either put up quite a fight or do business, is admissible as to the intent of the assault unless too remote in time; and the question whether declarations and threats of a defendant are so remote in time as to lack probative effect is one resting largely, if not entirely, in the discretion of the trial court.

2. Testimony that defendant's wife stated to the prosecutrix, after the assault, that she had not intended to return home that night, and that prosecutrix thereupon asked why she had not been told of that fact, was inadmissible even as impeaching testimony because the statements were hearsay, made out of the defendant's presence, and it was not shown that the wife's intention was known to him; and the admission of this evidence is *held* error requiring reversal.
3. Under sec. 4072, Stats. 1915, as amended by ch. 433, Laws 1917, making a husband and wife competent witnesses for or against the other, except that neither one, without the consent of the other, shall disclose a "private" communication, statements by a husband to a wife as to the occurrence out of which a prosecution for assault with intent to rape arose are inadmissible, the amendment, by substituting "private communications" for "confidential communications," having restricted rather than enlarged the class of communications which may be inquired into.

ERROR to review a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Assault with intent to commit rape. The defendant was charged with having, on the 13th day of April, 1919, committed a felonious assault upon one Susie Patterson with intent to commit the crime of rape. Upon the trial the jury found the defendant guilty as charged. There were the usual motions to set aside the verdict and for a new trial, which were overruled, and the defendant was duly sentenced to six years in the state prison, and brings this writ to review the action of the trial court.

For the plaintiff in error there was a brief by *Ruggles & Evenson* of Baraboo, attorneys, and *Darrow, Sissman, Popham & Carlin* of Chicago, of counsel; and the cause was argued orally by *Clarence S. Darrow.*

For the defendant in error there was a brief by the *Attorney General, J. F. Baker,* assistant attorney general, and *Henry J. Bohn,* district attorney of Sauk county; and the cause was argued orally by *Mr. Baker* and *Mr. Bohn.*

ROSENBERRY, J. The complaining witness, Susie Patterson, is a school teacher. Prior to the date of the assault she had taught for one term and a part of another in the district in which the defendant resided, during which time she had boarded in the home of the defendant, where she was living at the time of the alleged assault. The defendant, his wife, and the complaining witness lived alone, except on such occasions as company was present. The assault took place on Saturday night at a time when the defendant's wife was absent from the home. The verdict is first challenged because it is not supported by the evidence, for the reason that there is no proof that the defendant intended to have sexual intercourse with the complaining witness even though she should resist to the utmost. No useful purpose would be served by setting out in detail the evidence in this case. In accordance with the rule laid down in *Lonergan v. State,* 111 Wis. 453, 87 N. W. 455, and in *Gerke v. State,* 151 Wis. 495, 139 N. W. 404, and *Koscak v. State,* 160 Wis. 255, 152 N. W. 181, the evidence has been thoroughly and carefully reviewed, and the court is of the opinion that, as the record stands, there is evidence from which the jury might properly find beyond reasonable doubt that the defendant was guilty of the offense charged. Inasmuch as there must be a new trial, we avoid, as far as possible, commenting upon the evidence,

Numerous objections were made to the admission of evidence, and error is assigned because certain evidence was admitted over the objection of the defendant. One George Cook was permitted to testify that about fifteen months previous to the time of the assault the defendant said to him in speaking of the prosecutrix: "If my wife is ever gone I will try her out and see whether she is sporty. She will put up quite a fight or she will do business." It is claimed that this testimony was irrelevant and immaterial and too remote, that it had no connection with the element of the offense charged, that it tended to cause the jury to lose sight of the issues made by the plea of not guilty, and that it was

prejudicial to the defendant. The testimony referred to, if admissible at all, is admissible for the purpose of characterizing the intent with which the defendant assaulted the complaining witness. If by the word "fight" the defendant meant the complaining witness would have to resist to the utmost, and if such resistance did not defeat his purpose that she would be compelled to submit, it may have that effect and therefore be admissible unless too remote in time.

The question of whether or not declarations and threats of a defendant are so remote in time as to lack probative effect is a question resting largely, if not entirely, in the discretion of the trial court. 1 Wigmore, Ev. § 399, and cases cited; 16 Corp. Jur. p. 561, § 1087. We are not called upon in this case to say whether or not there may be an abuse of that discretion. In some jurisdictions it is held that there may be. We are clear, however, that in this case there was no abuse of discretion in admitting the defendant's declaration. The fact that the declaration was made many months prior to the time of the assault affects its weight and not its admissibility and is a circumstance which should be, and no doubt was, taken into account by the jury.

Augusta Barber, wife of the defendant, was asked upon cross-examination if her husband had told her what had happened. She replied that he did and that she knew all there was to know. She was then asked:

"Isn't it a fact, Mrs. Barber, that at the Miller home that night you said in the presence of Mrs. Miller and Miss Patterson that you could tell by the condition in which you found the bedroom that the girl had put up a brave fight? *A.* I never did. *Q.* Isn't it a fact that you there said that your husband had confessed the whole thing to you and that you did not blame Miss Patterson in the least? *A.* I never said any such thing."

Mrs. Grace Miller, in whose home it was claimed that Mrs. Barber had made the statements referred to, was recalled in rebuttal and was permitted to testify in detail as to

what Mrs. Barber said and did upon the occasion of this visit to the Miller home. She testified:

"Mrs. Barber asked where Miss Patterson was and asked Miss Patterson what she was doing in that predicament, and Miss Patterson told her she ought to know. She said *Mr. Barber* had told her all and she knew all about it and she wanted to speak to Miss Patterson alone. . . . She told Miss Patterson that her husband had told her all that had happened. . . . She said the room certainly showed that Miss Patterson had put up a brave fight and I don't blame her at all. She said to Miss Patterson, You know I didn't intend to come home to-night. Miss Patterson said, You didn't? and she said No, I intended to go to the home of my brother and stay over night. Miss Patterson said, Why didn't you tell me that, I didn't know it; and Mrs. Barber never answered her."

In disposing of the motion for a new trial the court said: "The only question raised by the motion that has given me any concern is the question of whether the failure of the defendant to request, or of the court to give, an instruction to the effect that Mrs. Miller's testimony could only be considered for the purpose of impeaching the testimony of Mrs. Barber, the wife of the defendant," and concluded that he could not grant the motion for a new trial because the instruction was not given.

All the statements made by Mrs. Barber in the Miller home were made in the absence of her husband. Her statements, therefore, as to what she intended to do or what her purpose was in going to Baraboo on the night in question were, as to the defendant, pure hearsay, and not admissible upon any theory of the case. Such statements afford no basis for the introduction of impeaching testimony. So far as the defendant was concerned, it was wholly immaterial what his wife had stated or what she intended to do, so long as it was not shown that her plan or intent was communicated to him and that he had knowledge thereof. Mrs. Miller's testimony was therefore not admissible for

the purpose of impeaching Mrs. Barber. The question of the defendant's guilt or innocence being a very close one upon the facts, the jury may have given controlling weight to this inadmissible testimony. The defendant is entitled to have not only a fair but a legal trial, and to have the question of his guilt or innocence determined upon the evidence legally admissible to establish it. Under the circumstances disclosed by the evidence in this case we do not feel that justice has been done the defendant (sec. 2405*m*, Stats.). The introduction of these collateral matters, to which the defendant was in no way a party, may have been highly prejudicial to him. The fact that his wife did not intend to return, if such was the fact, to her home that night, afforded the defendant a much greater opportunity for the commission of the offense than he would otherwise have had. It may have been in the minds of the jury a very significant fact.

Under a recent amendment to sec. 4072, Stats., "A husband or wife shall be a competent witness for or against the other in all cases, except that neither one without the consent of the other, during marriage, nor afterwards, shall be permitted to disclose a private communication, made during marriage, by one to the other, when such private communication is privileged." In view of the fact that there must be a new trial, we have called attention to this statute. As to privileged communications, the wife is not a competent witness against the husband except by his consent. Prior to the amendment of sec. 4072 by ch. 433, Laws 1917, it was provided thereby that "A husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage, without the consent of the other." The adoption of the amendment did not relax the rule as to confidential communications, but, by substituting the words "private communication" for "confidential communication," the class of communications which may be inquired into was restricted rather than enlarged. *Dexter*

v. Booth, 2 Allen (Mass.) 559; Jones, Ev. (2d ed.) § 735. The statements made by the husband to the wife were clearly privileged. Whether the privilege had been waived or the conduct of the husband amounted to a consent does not seem to have been considered, and we call attention to it here in view of the fact that there must be a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison will deliver the defendant into the custody of the sheriff of Sauk county, who will hold him in custody until further order of the court.

FRANK MARTIN-LASKIN COMPANY and another, Appellants, vs. GOETSCH and another, Respondents.

October 19—November 16, 1920.

Workmen's compensation: Notice of injury: Sufficiency: Knowledge of foreman of corporation: Failure to give written notice: Effect.

1. Where an employer has notice within thirty days that an accident has happened and that some injury has resulted to an employee by reason thereof, he has the knowledge that it was intended by sec. 2394—11, Stats., should be brought home to him by the service of written notice. Such notice should describe the nature of the injury as fairly as possible under the circumstances existing at the time the notice is given.
2. A foreman's knowledge of an injury to an employee is not notice to the employer within said sec. 2394—11; and where the employer is a corporation, this requirement can be satisfied only by service on a managing officer.
3. Knowledge of a foreman concerning an accident does not take the place of the statutory notice unless it is shown that the knowledge of the foreman was communicated to the employer; and under sec. 2394—11 failure to give the employer personal notice of an injury will bar recovery unless the industrial commission finds as a fact that there was no intention to mislead the employer and that he was not in fact misled by failure to give the notice.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to review an award of the *Industrial Commission.* From the judgment of the circuit court affirming the award the plaintiffs appealed.

On June 16, 1917, *Frank Goetsch* was employed as a carpenter by the plaintiff *Frank Martin-Laskin Company.* While engaged in removing shoring from the ceiling of a room a board fell and struck him on the head. There was a nail in the end of the board, which penetrated his scalp and caused blood to flow. He felt dizzy and sat down for ten minutes or so and then went on with his work. The accident happened about 10:30 in the forenoon. The foreman under whom *Goetsch* was working was present immediately after the accident and saw the wound inflicted on *Goetsch's* head. He worked until noon, lunched on the job, and worked a part of the afternoon. He returned to work Monday or Tuesday. He was laid off Tuesday night, rested at home for a week, and went to work at a railway roundhouse. He worked there a week and was then laid off, because he could not move around, as he said. He has done no work since and it is conceded that he is now incapacitated. During the time he rested before going to work at the roundhouse he consulted his family physician and has been under his treatment ever since.

Several doctors testified at the hearing before the *Industrial Commission* concerning the nature of his disease, respecting which there was considerable disagreement among them. Dr. Charles H. Lemon, who examined *Goetsch* on behalf of the insurance carrier, diagnosed his condition as resulting from a mild venous hemorrhage of the brain, a slow hemorrhage occurring on one hemisphere of the brain, and testified that the proper treatment therefor was a trephining operation, which, if performed in this case within six weeks of the injury, would unquestionably have proven

successful. The *Industrial Commission* was of the opinion that Dr. Lemon's diagnosis was correct.

No notice of the accident or the injury, as required by sec. 2394—11, Stats., was served on the employer. The *Industrial Commission* held, however, that the employer had actual notice of the accident and injury by reason of the presence of the foreman at the time of the accident, found all other facts necessary to entitle the claimant to compensation, and made an award in his favor.

For the appellants there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt,* all of Milwaukee.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

OWEN, J. Sec. 2394—11, Stats., provides:

"No claim to recover compensation under sections 2394—3 to 2394—31, inclusive, shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing, stating the name and address of the person injured, the time and place where the accident occurred, and the nature of the injury, and signed by the person injured or by some one on his behalf, or in case of his death, by a dependent or some one on his behalf, shall be served upon the employer, either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelope addressed to him at his last known place of business or residence. Such mailing shall constitute completed service; . . . and provided, further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery . . . if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby."

The questions here presented arise from the fact that no written notice of the injury was served upon the employer

as required by the provisions of the section of the statutes above set forth. The *Industrial Commission* found that the employer had actual notice by reason of the presence of the foreman at the time of the accident. The correctness of this conclusion is assailed by appellants on two grounds: First, that under sec. 2394—11 notice to the foreman was not notice to the employer; and second, that even though notice to the foreman be notice to the employer, yet, under the circumstances of this case, the foreman did not have knowledge of the facts which the statute contemplates shall be brought home to the employer by service of the required written notice; the contention as to the latter proposition being that while the foreman knew of the happening of the accident he had no knowledge concerning the nature of the injury resulting therefrom.

The statute requires that the written notice shall state the nature of the injury. From what the foreman was able to observe the injury appeared to be nothing more than a slight wound of the scalp. The serious or compensable injury developed after the employee had been discharged from his employment, the result being that neither the employer nor the foreman had knowledge of the fact that compensable injury had resulted from the accident. By requiring the notice to state the nature of the injury the legislature undoubtedly had some purpose in mind, and the contention that its purpose was to bring home to the employer the fact that compensable injury under the act had resulted from accident is by no means frivolous. The act deals with injuries resulting in loss to the employee. It is not concerned with injuries of a trifling nature resulting in no disability to the employee. There is much force to the contention that unless compensable injury resulted from the accident there is no point in giving the notice. However, the notice must be given within thirty days, and it may be given at any time within the thirty days. It may be given the day after the happening of the accident and meet the statutory requirements. It is matter of common knowledge that

serious consequences develop from injuries which appear to be of a slight and trifling nature. To give the statute the construction contended for would mean that where the serious consequences had not sufficiently developed to indicate a compensable injury within thirty days so that an injury entitling the employee to compensation could be stated in the notice, the employee would have no claim for compensation. We are reluctant to give the statute such a construction. There is no reason to believe that the legislature intended to provide compensation only for those injuries which developed within a period of thirty days. The statute should be liberally construed to attain the accomplishment of its beneficent purposes. *Sadowski v. Thomas F. Co.* 157 Wis. 443, 449, 146 N. W. 770; *Kiel v. Industrial Comm.* 163 Wis. 441, 445, 158 N. W. 68.

We are therefore of the opinion that where the employer has notice that an accident has happened and that some injury, no matter how trifling, has resulted to an employee by reason thereof, he has the knowledge that it was intended should be brought home to him by the service of the written notice. Of course it must be understood that the nature of the injury should be described as fairly as possible under the facts and circumstances existing at the time the notice is given.

We are of the opinion that under the provisions of our statute notice to the foreman does not constitute notice to the employer. The statute expressly requires the notice to be served on the employer. It "shall be served . . . either by delivering to and leaving with him a copy of such notice, or by mailing to him by registered mail a copy thereof in a sealed and postpaid envelope addressed to him at his last known place of business or residence." Where the employer is a corporation, this requirement can be satisfied only by serving on a managing officer of the corporation. Under the provisions of this statute there is no room for saying that the knowledge of the foreman is imputed to the em-

ployer. The common-law principles of negligence which make the knowledge of the foreman the knowledge of the employer have no application here. The legislature has seen fit to require notice of the accident and the injury to be given to the employer personally. A notice served on the foreman does not comply with the requirements of the statute. Apparently the object of the statute is to bring home to the employer personal knowledge of the accident and injury. Knowledge of a foreman is not knowledge of the employer within the contemplation of this statute and does not take the place of the notice unless it be shown that the knowledge of the foreman was communicated to the employer. This does not appear. Under the statute quoted this will bar a recovery unless the *Commission* finds as a fact that there was no intention to mislead the employer and that he was not in fact misled by failure to give the notice. This question was not passed upon by the *Commission,* and it will be necessary to remand the case to the *Commission* for the purpose of making a finding thereon.

By the Court.—Judgment reversed, and cause remanded to the circuit court with directions to set aside the award and to remand the record to the *Industrial Commission* with instructions to make a finding upon the question of whether there was any intention to mislead and if the employer was in fact misled by failure to give the notice. No costs to be taxed.

CAYLL and another, Respondents, vs. WAUKESHA GAS & ELECTRIC COMPANY, imp., Appellant.

October 19—November 16, 1920.

Workmen's compensation: Workman loaned by immediate employer to another: Liability for compensation: Review of award of industrial commission: Findings of fact based on undisputed evidence.

1. Where an employee of an excavation contractor consented to be transferred to the service of a gas company laying pipe in ditches dug by the contractor, and was injured while working for the gas company and under its sole control, the gas company, and not the contractor, was liable for compensation under sub. (2), sec. 2394—3, sub. (2), sec. 2394—4, and sub. (2), sec. 2394—7, Stats. 1915, he being an "employee" of the gas company under an implied contract of employment, within the common-law rule, though he continued to work for the contractor one hour a day and was continued on his pay-roll. [Whether the workman might look to either the contractor or the company for compensation, not decided.]
2. A finding of the industrial commission on the question of the relationship sustained by a workman to parties to whom he was transferred is not conclusive where the evidence is undisputed, the question in such case being one of law.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award of the industrial commission under the workmen's compensation act (secs. 2394—1 to 2394—31, Stats.).

One Thomas Massino was engaged in carrying sewer pipe at the time of the injury in question on June 3, 1917. The pipe was coated with tar, and as he threw a section of it off from his shoulder it stuck to his jacket, nearly threw him, and thus caused a recurrence of an umbilical hernia.

Massino had been in the general employ of respondent *Cayll,* an excavation contractor, who held a contract to do ditch-digging and back-filling for construction work of the

appellant, *Waukesha Gas & Electric Company.* The appellant company was itself laying the pipe in the ditches so dug by respondent *Cayll.* The appellant company was short of men and unable to keep up with the progress made by respondent *Cayll.* Because of this the company asked *Cayll* for the "loan" of some men to help on their part of the work. *Cayll* assented and asked Massino if he wanted to work for the company. Massino consented and went to work carrying and laying pipe for the company. As to this work he was under the control and direction of the company. As the company operated on a nine-hour day and *Cayll* on ten, Massino continued to work for *Cayll* one hour a day in order not to lose pay. The company paid *Cayll* for the time spent on its work and *Cayll* carried Massino on his pay-roll as theretofore. It was after this arrangement had continued for some weeks and while thus performing the work of the appellant company that Massino was injured.

There is no proof in the record that Massino has made any claim under the workmen's compensation act either against *Cayll* or the company. There is an uncontroverted statement in *Cayll's* petition to the industrial commission that he made claim upon both.

Cayll and his compensation liability insurer commenced a proceeding before the industrial commission of Wisconsin, setting forth the situation, alleging that Massino was not employed by *Cayll* at the time of injury, and praying that they be dismissed from any claim under the act. The *Waukesha Gas & Electric Company* answered that Massino was not employed by it, but was an employee of *Cayll,* being under his direction and control and paid by him.

A hearing was held by the commission, which thereafter made its findings of fact and award. The commission found the main facts above stated, or they appeared uncontroverted upon the testimony, and that Massino did "not seem to have understood that he was an employee of the *Gas & Electric Company,* but assumed that he was still working for *Cayll;*"

that the injury came as a hazard of the company's business, had no connection whatsoever with the business of *Cayll,* and that the "loan" of Massino was made as a pure accommodation by *Cayll,* without monetary consideration to him. The commission concluded that the moral obligation to pay was upon the company. The commission further found that the relationship of *Cayll* and the company was such that Massino had no cause to inquire who he was working for, the work proceeding at one time and place; that he still seemed to recognize *Cayll* as his "real boss;" and that no one disabused him of that notion.

For these reasons the commission concluded that it could not find as a fact that Massino was not working for *Cayll* under contract of hire, and that, in so far as Massino was concerned, *Cayll* and his insurer must see that he is indemnified. The award followed, ordering *Cayll* and his insurer to pay the prescribed amounts of compensation. There was no direct finding that Massino was in the service of *Cayll* at the time of the injury.

Action was commenced in the circuit court for Dane county by *Cayll* and his insurer to set aside the findings, order, and award of the commission. The complaint set up the usual objections made in such cases, and further, that the injury came as a hazard of the company's business, having no connection with the business of *Cayll,* and that Massino was under the working directions and orders of the company.

The circuit court held that Massino at the time of the injury was in the employ of the *Waukesha Gas & Electric Company,* and ordered that the company be substituted in the award as the party liable to pay the compensation. Judgment was entered accordingly, and from the judgment this appeal is taken by the *Waukesha Gas & Electric Company.*

M. A. Jacobson of Waukesha, for the appellant.

For the respondents there was a brief by *Walter F. Mayer* and *James E. Coleman,* both of Milwaukee, and oral argument by *Mr. Mayer.*

For the defendant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

JONES, J. This case comes before us in quite an unusual manner. Although it involves the rights of a laborer under the workmen's compensation act, the employee takes no active part in this appeal. The contest is between two parties who both deny liability, and each alleges that the other was the employer of the servant, Massino, and liable for any compensation which may be due him.

It is alleged in the petition of *Cayll,* respondent, that Massino has claimed that both are liable, although, so far as the record shows, he has filed no formal claim against either.

On the main question litigated there was very little conflict in the evidence, although very different inferences were drawn therefrom.

The statute, as in force at the time of the injury, prescribed that liability shall exist against an employer for any personal injury accidentally sustained by his employee where the following conditions occur (*inter alia*):

"(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." Sec. 2394—3, Stats. 1915.

The following, in part, were defined as constituting employers as above used:

"(2) Every person, firm, and private corporation (including any public service corporation), who has any person in service under any contract of hire, express or implied, oral or written, . . ." Sec. 2394—4, Stats. 1915.

The term "employee," as used in the act, was construed to mean (in part):

"(2) Every person in the service of another under any contract of hire, express or implied, oral or written, . . . but not including any person whose employment is but casual or is not in the usual course of the trade, business,

profession, or occupation of his employer." Sec. 2394—7, Stats. 1915.

In finding that *Cayll* must indemnify Massino the industrial commission relied very much on the facts that he was hired and paid by the respondent and that he believed that the respondent was his employer. In finding that the appellant company must pay the indemnity the trial judge relied on the facts that Massino was injured while engaged in performing labor for the *Gas Company* which had no connection with the business of *Cayll;* that when the injury happened he was doing his work under the immediate direction and control of the foreman of the *Gas Company;* and that although he may have supposed that *Cayll* was his "boss," he had also stated that he was working for the *Gas Company.*

Under the undisputed facts there might well be doubts in the mind of Massino whether *Cayll* or the *Gas Company* was his employer, and we do not consider that his opinion on that subject should have much significance in arriving at a decision as to his rights.

In determining whether Massino was an employee of the *Gas Company* there are other facts to be considered which we regard of greater importance. Although in the employ of *Cayll,* he consented to be transferred to the service of the *Gas Company.* The injury occurred as part of the hazards of the business of that company, during work over which *Cayll* had no control and while Massino was solely under the direction of the appellant. While there was no express contract between Massino and the *Gas Company* there was, within the meaning of the act, an implied contract. Sub. (2), sec. 2394—7, Stats. 1915. While in some respects the employee was subject to the control of *Cayll,* the situation was such that the *Gas Company* was the proprietor of the work being carried on, and could at all times determine how the work should be done and whether it should stop or continue.

It was well settled at common law that where an employee, with his own consent, was loaned to a special employer, he became the servant of such employer. The English workmen's compensation act changed this rule and provided:

"Where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service, . . . the latter shall, for the purposes of this act, be deemed to continue to be the employer of the workman whilst he is working for that other person." Stat. 6 Edw. VII. ch. 58, sec. 13.

This act was considered by the committee of our legislature which framed the workmen's compensation act, and it was brought to the attention of the legislature. It is fair to assume that the legislature, by failing to adopt this section, intended that the common-law rule would continue so far as applicable to such a transfer of service as is here involved.

Very able and elaborate briefs have been filed on this appeal by counsel on both sides citing many cases bearing upon this interesting question. Without commenting upon them, we cite a few of the many decisions which in our opinion sustain the view that when a workman is transferred with his own consent, as in this case, by an employer to a special employer, the latter may become liable to pay indemnity when he is in the exclusive control and management of the work in which the injury is received. *Scribner's Case,* 231 Mass. 132, 120 N. E. 350; *Coughlan v. Cambridge,* 166 Mass. 268, 277, 44 N. E. 218; *Shepard v. Jacobs,* 204 Mass. 110, 90 N. E. 392; *Kucharuk v. McQueen,* 221 N. Y. 607, 117 N. E. 1073; *Dale v. Hual C. Co.* 175 App. Div. 284, 161 N. Y. Supp. 540; *Westover v. Hoover,* 88 Neb. 201, 129 N. W. 285. See *Standard Oil Co. v. Anderson,* 212 U. S. 215, 29 Sup. Ct. 252.

The industrial commission expressed the view that the *Gas Company* was under a moral obligation to indemnify Massino, but on legal grounds felt bound to hold that the

indemnity should be paid by *Cayll*. The trial judge held that both legally and morally the obligation rested upon the *Gas Company*. In this view we concur.

It is suggested in the brief of the attorney general that Massino had the right to look to either employer, and New York cases were cited to support that position. It is our view that there might be such a state of facts that both the general and the special employer would be liable. In view of the findings of the commission in this case and the terms of the compensation act, however, we find it unnecessary to decide this question in the present proceeding. We reserve our decision upon this point until it is necessarily presented.

The finding of the commission, approved by the trial court, as to the fact of disability and the amount of the award is sustained by the evidence.

The point was made that the finding of the commission that *Cayll* was liable instead of the *Gas Company* is conclusive. We deem it a sufficient answer that there was practically no conflict in the evidence, and that the relationship sustained by Massino to the other parties was a question of law on the undisputed evidence and the findings of the commission. Moreover, the commission made no direct finding that the workman was in the employ of *Cayll* or of any fact inconsistent with this opinion.

By the Court.—Judgment affirmed.

MILWAUKEE-WESTERN FUEL COMPANY, Appellant, vs. INDUSTRIAL COMMISSION and others, Respondents.

October 19—November 16, 1920.

Workmen's compensation: Action to review award: Jurisdiction: Necessary parties to action: Alien property custodian: Alien dependent.

1. The court obtains no jurisdiction to review an award of the industrial commission under the workmen's compensation act unless an action is commenced for that purpose within twenty days after the date of the award, in which the adverse party, namely, the person in whose favor an award is made, shall be made a defendant.
2. Where an award under the compensation act for the death of an alien enemy was made payable to the alien property custodian under the federal Trading with the Enemy Act—40 U. S. Stats. at Large, 411, ch. 106, sec. 7 (c),—a nonresident infant dependent of the deceased employee was not the "adverse party" required to be made a defendant to an action by the employer to review the award. The alien property custodian has title to the award which was made in his favor, and is the adverse party in an action to test its legality, the alien dependent being a proper but not a necessary party to the action.

APPEAL from a judgment and an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This action was brought to set aside an order and award of the *Industrial Commission*, wherein it was determined that on July 14, 1918 (while we were at war with Austro-Hungary), Stojan Ziroz suffered a fatal accident while in the employ of the plaintiff; that he left surviving him a minor son residing in Austria; that the minor son was living with deceased and solely and wholly dependent upon him for support; that the minor son was entitled to the sum of $2,843.02; that this sum should be paid by plaintiff to the alien property custodian and be held by him and administered by him as provided by law.

The *Industrial Commission, Francis P. Garvin,* custodian of alien property, and *Lazo Ziroz* (the minor son) were named parties to the action. A copy of the summons and complaint was served on Dr. Herschman, as representative of the royal consulate of Sweden and sole legal representative of *Lazo Ziroz,* but no personal service was made on *Lazo Ziroz* and no service was made on him by publication. The sheriff returned that *Lazo Ziroz* could not be found.

The case was heard before the court. The *Industrial Commission* and the alien property custodian defended the action on the ground that the court was without jurisdiction because *Lazo Ziroz* was not served with the summons and complaint nor by publication. The trial court held that *Lazo Ziroz* was an adverse party and service must be made upon him, and that, there having been no such service, the court is without jurisdiction. Plaintiff then made a motion for an order permitting an amendment of the summons and complaint by making Dr. Herschman, as representative of the royal consulate of Sweden and the sole legal representative of *Lazo Ziroz,* a party to the action. An affidavit was offered showing that Dr. Herschman had been served with the summons and complaint, was served with notice of trial, and signed a stipulation in the action continuing the case in circuit court, and that he thus appeared in the action. The plaintiff's motion was denied on the ground that the court had no power to permit an amendment bringing in new parties more than twenty days after the order or award complained of.

Plaintiff appeals from the judgment of the court dismissing the action for want of jurisdiction, also from an order denying plaintiff's motion to make Dr. Herschman a party to the action.

For the appellant there were briefs by *Fawsett & Smart* of Milwaukee, and oral argument by *Edward M. Smart.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Garvin,* alien property custodian, there was a brief by *W. H. Timlin, Jr.,* attorney, and *Timlin & Dean,* of counsel, all of Milwaukee; and the cause was argued orally by *Mr. Timlin.*

SIEBECKER, C. J. The trial court properly held that it is the settled law of this state that the court obtains no jurisdiction to review an award of the *Industrial Commission* unless an action is commenced for that purpose within twenty days after the date of the award, "in which action the adverse party shall also be made a defendant" (*Gough v. Industrial Comm.* 165 Wis. 632, 162 N. W. 434), and that the adverse party is "the one in whose favor the award was made." *Hammond-Chandler L. Co. v. Industrial Comm.* 163 Wis. 596, 158 N. W. 292. The question presented is, Did the court err in holding that *Lazo Ziroz* is a necessary adverse party and that he must be served with summons to obtain jurisdiction of the action? That *Lazo Ziroz,* if served, would be a proper party may be conceded. The inquiry remains: Is he an adverse party who must be served with process to acquire jurisdiction? As above stated, the award is made payable to the alien property custodian under the federal Trading with the Enemy Act and the executive orders made pursuant to the authority conferred by Congress. 40 U. S. Stats. at Large, 411, ch. 106. Sec. 7 (c) of this act provides:

"If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

The record discloses that the President, through the alien property custodian, has determined that the award in question be required to be paid to the alien property custodian.

There is no controversy respecting the propriety of this requirement upon the ground that *Ziroz* was an ally of an enemy and that the demand was effectively made. It is provided by executive order of February 26, 1917, that such demand "shall forthwith vest in the alien property custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the alien property custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the Enemy Act,'" under the orders, rules, and regulations authorized to be made. The effect of the act and executive orders is to vest title in the custodian. *Youghiogheny & Ohio C. Co. v. Industrial Comm.* 171 Wis. 347, 176 N. W. 855. The necessary consequence is that *Lazo Ziroz* retains no right or power over the award and the alien property custodian has title thereto to the exclusion of *Ziroz*. Under these conditions he cannot be considered the adverse party within the contemplation of the statutes and hence he is not a necessary party to the action to test the legality of the award in court. The alien property custodian is in law the adverse party for the purposes of this action as the person in whose favor the award is made. Service and appearance of the alien property custodian gave the court jurisdiction of the parties and the subject of the action. The court having acquired jurisdiction and the necessary parties appearing in the action, plaintiff is entitled to proceed to litigate the issues that may be presented. This makes it unnecessary to discuss other questions in the case. The application to amend the summons and complaint to make Dr. Herschman a defendant in his capacity of representative of the royal consulate of Sweden becomes immaterial.

By the Court.—The judgment appealed from is reversed, and the cause remanded for further proceedings.

MANTEUFEL, Respondent, vs. JENKINS and others, Appellants.

October 19—November 16, 1920.

Workmen's compensation: Notice of injury: Payment of funeral expenses as payment of compensation.

An employer, by paying the funeral expenses of a deceased employee under sub. (4)(d), sec. 2394—9, Stats. 1915, to an administrator on the supposition that the deceased employee left no dependents, is not estopped from pleading a want of the notice required by sec. 2394—11, barring a right to compensation if no notice is given and no "payment of compensation" made within two years from the date of the accident. The payment of funeral expenses is not a payment on account of compensation.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Workmen's compensation. One William Muellner, brother-in-law of the plaintiff, while in the employ of the defendant *W. T. Jenkins*, on the 16th day of March, 1916, met with an accidental injury, resulting in his death the same day. He was engaged in performing service growing out of and incidental to his employment, and both his employer and the employee were subject to the Wisconsin compensation act. Acting upon the supposition that there were no surviving dependents, the employer, on the 5th day of April, 1916, issued a check for $100, payable to the estate of William Muellner, on account of funeral expenses. The check was cashed on the 25th day of September, 1916. On the 10th day of March, 1919, the plaintiff filed an application for compensation against the defendant *W. T. Jenkins*, setting forth the injuries sustained by William Muellner, the fact of his employment, and claiming the right to compensation. Upon the hearing it appeared that William Muellner was seventy-two years of age; that the applicant was his sister-in-law, being the sister of his deceased wife;

that at the time of the injury the applicant was living in the same household with him and had been so living for many years, both before and subsequent to the death of his wife, which occurred several years prior to the death of William Muellner; that no compensation was paid to the deceased by the employer subsequent to his injury; that the applicant herein was paid nothing by the employer for death benefit; that no written notice, in accordance with the provisions of sec. 2394—11, Stats., was served on the employer, or on the insurance carrier, by William Muellner, or by any one on his behalf, or by his dependent, or by any one in behalf of the dependent, and the *Industrial Commission* held that the claim of the applicant was wholly barred by reason of such failure to give notice, and an order was entered accordingly. The applicant before the *Industrial Commission,* the plaintiff here, brought an action in the circuit court for Dane county to review the order of the *Commission.* The circuit court for Dane county held that the payment of funeral expenses constituted a payment of compensation and therefore a waiver of that provision of the statutes requiring notice, entered judgment vacating the order of the *Commission,* and remanding the record to the *Industrial Commission* for further proceedings upon the merits. From such judgment the defendants appealed.

For the appellants *Jenkins* and *Ætna Life Insurance Company* there was a brief signed by *Quarles, Spence & Quarles,* attorneys, and oral argument by *Arthur B. Doe,* of counsel, all of Milwaukee.

For the appellant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent there was a brief by *Fawcett & Dutcher,* attorneys, and *L. W. Slensby,* of counsel, all of Milwaukee, and oral argument by *Mr. Slensby.*

ROSENBERRY, J. The question presented by this record is, Did the payment by the employer of funeral expenses of $100 within thirty days of the happening of the accident constitute payment of compensation under secs. 2394—3 to 2394—31, inclusive, Stats. 1915, being the workmen's compensation act? Sub. (4)(d), sec. 2394—9, Stats. 1915, provides:

"If the deceased employee leaves no person dependent upon him for support, and the accident proximately causes death, the death benefit shall consist of the reasonable expense of his burial, not exceeding one hundred dollars."

By sec. 2394—11, Stats. 1915, it is provided:

"No claim to recover compensation . . . shall be maintained unless, within thirty days after the occurrence of the accident, . . . notice in writing, . . . signed by the person injured or by some one on his behalf, or in case of his death, by a dependent or some one on his behalf, shall be served," etc. "If no such notice is given and no payment of compensation made, within two years from the date of the accident, the right to compensation therefor shall be wholly barred."

It is to be noted that under sub. (4) (d) of sec. 2394—9 the funeral expenses are to be paid by the employer if the deceased employee leaves no person dependent upon him for support. If the deceased employee leaves such a dependent, then the employer is not liable under this clause of the statute. In other words, a payment of the funeral expenses is not a payment of any sum to which a dependent of a deceased employee is entitled. To hold that the payment of $100, under such circumstances, on account of funeral expenses, is a payment on account of compensation to which it could not, under any circumstances, be applied, seems to us to be inconsistent. No doubt the idea which the legislature had in mind was that where an employer, by payment of a part of his liability, had recognized the existence of such liability, he was thereafter to be estopped from pleading want of statutory notice. Here the payment was

certainly not made in recognition of any liability existing to dependents, but only because it appeared that there were no dependents; and while provision for the payment of funeral expenses is included within that section which provides for compensation, looking at the substance rather than the form of things, we think it was the legislative intent that a payment which recognizes a liability, not a payment which is made to extinguish a liability, was the compensation referred to under the terms of sec. 2394—11. It is true that the payment recognized the fact that the deceased was an employee, that the employer and employee were subject to the act, and that accidental injuries were to be compensated in accordance with its terms, but it did not recognize liability for compensation to any dependent in any amount. The payment of funeral expenses, under this clause, to an administrator, is not the payment of compensation due to a dependent and does not, therefore, estop the employer from claiming the benefit of the statute requiring a notice to be given by the dependent. The trial court was therefore in error in vacating the order of the *Commission.*

By the Court.—The judgment appealed from is reversed with costs, with directions to enter a judgment affirming the order of the *Commission* holding that the claim of the plaintiff is barred.

MAHONEY, Appellant, vs. KENNEDY and another, Respondents.

October 19—November 16, 1920.

Statute of frauds: Sale of corporate stock: Part performance: Seller surrendering interest and management of corporation to buyer: Evidence: Correspondence after sale.

1. Under secs. 1751 and 1751*n*—10, Stats., the capital stock of a corporation is personal property, and a sale thereof comes within the statute of frauds (sec. 2308) unless taken out by part performance.

2. A contract for the sale of the capital stock of a corporation engaged in publishing a newspaper, where no certificates of stock had been issued or printed, was partly performed so as to be taken out of the statute of frauds where the seller, who owned a controlling interest in the corporation, resigned his office, delivered possession to the buyers, and they, by an agent, assumed control and management of the corporation.
3. Correspondence between the parties after the contract was alleged to have been made and before action was commenced, stating the claims of the parties as to the existence of the contract and its contents, is admissible as tending to show the claims or admissions by silence or failure of denial of the parties.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover $7,000, the purchase price of plaintiff's interest in the Janesville News Publishing Company, alleged to have been sold to defendants under an oral contract claimed to have been sufficiently performed to take it out of the statute of frauds. The defendants put in separate answers denying making the contract. At the close of plaintiff's evidence the court granted a motion for a nonsuit and entered judgment accordingly, on the ground that if the contract was made as claimed by plaintiff it was void under the statute of frauds because there had been no sufficient performance of it to lift the ban of the statute. Plaintiff appealed.

For the appellant there was a brief by *Edward H. Ryan* of Janesville, attorney, and *Grady & Farnsworth* of Portage, of counsel; and the cause was argued orally by *Daniel H. Grady.*

For the respondents there was a brief by *George G. Sutherland,* attorney, and *Charles E. Pierce,* of counsel, both of Janesville; and the cause was argued orally by *Mr. Pierce.*

VINJE, J. Plaintiff's evidence tended to show these facts: That on November 20, 1919, the plaintiff, who was then owner of a controlling interest in the Janesville News

Publishing Company, a corporation whose certificates of stock had not been issued or even printed, by an oral agreement with the defendants sold his interest to them for the sum of $7,000 to be paid within two weeks. No writing was signed and no money was paid at the time. Plaintiff had been general manager of the Janesville News, the paper published by the corporation, up to this time, and had checked against the corporation's account in the First National Bank of Janesville. His assistant manager, J. E. Jones, had been in active charge of the office, and it appears that the relations between him and plaintiff were not harmonious and that to restore harmony defendants bought out plaintiff's interest. Both of them were interested in the corporation before, but did not have a controlling interest. The evidence further shows that plaintiff wrote to the First National Bank and canceled his checking right against the funds of the corporation, telling the bank that hereafter the defendants would control such right; that thereafter Jones did the checking until about February 15, 1920, when defendant *Burns* was elected treasurer and began to check in behalf of the corporation. Plaintiff had also been secretary and treasurer and these offices he resigned or relinquished. He did nothing in the conduct of the paper or corporation after November 20, 1919, except to write a letter to the defendants advising them as to the policy he thought the paper should still pursue as to some questions of public interest.

Jones testified that on November 20, 1919, he had a talk with defendants at about 9 o'clock in the evening and that "they stated that there would be no further trouble with *Mahoney;* that they had bought him out; witness said he was glad of it; they said they had paid him $7,000 and that witness would have no further trouble with *Mahoney*, and that witness should go on and run the paper for the best interest of the News." It appears that Jones remained in charge and ran the paper after that. Both of the defend-

ants were business men and neither of them had any intention to personally manage the paper. It also appeared that defendants had some negotiations looking to a sale of the job department of the company.

In view of the provisions of sec. 1751, Stats., providing that "The capital stock of every corporation, divided into shares, shall be deemed personal property," and of sec. 1751*n*—10, providing that "An attempted transfer of title to a certificate or to the shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts," it is clear that the alleged contract in question was one for the sale of personal property and so comes within the statute of frauds (sec. 2308, Stats.), unless taken out by part performance. The evidence, if true, would show that in performance of the contract the plaintiff ceased to act as secretary, treasurer, and general manager, notified the bank and defendants that his checking right was transferred to them, and that he took no further part in the management of the company. It would likewise show that defendants made J. E. Jones general manager in place of plaintiff and suffered him to check against the corporate funds in the bank; that they attempted to sell some of the corporate assets; and that they with Jones controlled the company thereafter.

In view of the nature of the subject matter sold it is difficult to see what more could have been done to perform the contract. The certificates of stock were not printed so could not be delivered. Possession of the thing sold was taken by the defendants through Jones, which was mutually consented to by both parties. That is a sufficient delivery and acceptance in law. 25 Ruling Case Law, 620 *et seq.* The nature of the subject matter of the sale in this case did not permit of a manual delivery, but delivery so far as possible was made by plaintiff stepping out and the defend-

ants stepping in. This constituted delivery and acceptance. 20 Cyc. 247; 25 Ruling Case Law, 620 *et seq.; Cotterill v. Stevens,* 10 Wis. 422; *Hankwitz v. Barrett,* 143 Wis. 639, 128 N. W. 430; *Hoberg v. McNevins,* 169 Wis. 486, 173 N. W. 221; *Wilson v. Hotchkiss,* 171 Cal. 617, 154 Pac. 1, L. R. A. 1916F, 389, and note on p. 393. The possession of Jones was the possession of defendants if his testimony is true. We therefore reach the conclusion that the circuit court erred in holding that there was no part performance shown sufficient to take the case out of the statute.

Letters passing between the parties after the contract is alleged to have been made and prior to the commencement of the action stating the claims of the parties as to the existence of the contract and its contents should have been received in evidence as tending to show the claims or admissions by silence or failure of denial of the parties. *Kimball v. Post,* 44 Wis. 471; *Hinton v. Wells,* 45 Wis. 268; *Murphey v. Gates,* 81 Wis. 370, 51 N. W. 573; *Moller v. J. L. Gates L. Co.* 119 Wis. 548, 97 N. W. 174.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

BERRYMAN and wife, Respondents, vs. LARMER, Appellant.

October 19—November 16, 1920.

Paupers: County system of poor: Proceeding to establish status of person: Judgment as estoppel in action by third party: Trial: Special verdict: Refusal to submit question not in dispute.

1. A county having adopted the county system of poor, the right to enforce liability for the support of a pauper is vested in the county superintendent of poor, so that the county court had no jurisdiction to enter a judgment requiring such support in a suit by the supervisors of a town within the countv.
2. A judgment in a proceeding to establish the status of the father of the defendant and of one of the plaintiffs as a poor person, which required the defendant to pay a stipulated sum

for his support, does not estop the plaintiffs from recovering against defendant on a contract made by him to pay stated sums weekly to them for such support.

3. Where it was conceded at the trial that defendant had the right to terminate the contract, but the jury found that he had not terminated it at the only time he claimed he did, it was not error for the court to refuse to submit a question requested by the defendant as to whether he had the right to terminate the contract.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Contract. The plaintiffs claimed that the defendant made an express agreement with them on the 2d day of July, 1913, by the terms of which the defendant agreed to pay the plaintiffs at the rate of $7 a week for the support and maintenance of William Larmer, the father of the defendant and of the plaintiff *Sarah Berryman,* when he was up, and $10 a week when William Larmer was confined to his bed. The defendant denied the making of the contract, claimed that the plaintiffs were concluded by a judgment in a former action commenced in the county court of Green county by the supervisors of the town of Albany, as the result of which the defendant was ordered and adjudged to pay to the chairman of the town of Albany the sum of $5 per week for the support of said William Larmer.

The case was tried, being submitted to the jury upon a special verdict. The jury found, first, that the defendant made the contract as claimed by the plaintiffs; second, that the payments to be made under the contract were not limited to the amount held by the defendant and belonging to William Larmer, and that on the 14th day of October, 1913, the defendant had in his hands $111 belonging to William Larmer. On the coming in of the verdict the defendant moved for judgment dismissing the complaint by reason of the estoppel which the defendant claimed grew out of the proceedings had upon the complaint of the town of Albany, and that it further appeared that the contract of

July 2, 1913, had been terminated in October, 1913, and moved to change the answer to the first question from "Yes" to "No." There was a motion by the plaintiffs for judgment upon the verdict, the defendant's motions were denied, and the plaintiffs had judgment for $2,350.84 damages and $82.76 costs, from which the defendant appeals.

H. N. B. Caradine of Monroe, attorney, and *Charles E. Pierce* of Janesville, of counsel, for the appellant.

J. L. Sherron of Monroe, for the respondents.

ROSENBERRY, J. The defendant's contention that the plaintiffs are estopped by the judgment rendered in the proceedings brought by the town board of the town of Albany against the defendant has no substantial support. It does not appear that the county court had jurisdiction, for the reason that at the time the suit was begun the county in which the town of Albany was situated had adopted the county system of poor and the right to enforce such liability as might have existed against George Larmer is, under that system, vested in the county superintendent of poor. Furthermore, that was a proceeding to establish the status of William Larmer as a poor person. The issues presented by the pleadings in this case were not within the issues presented in that case, neither is the result in this case dependent upon the status of William Larmer as a poor person. The issue presented here not having been presented by the issues or in fact tried by the former proceeding, that proceeding could not operate as an estoppel against the plaintiffs and prevent them from maintaining the present action.

Defendant further argues that the verdict of the jury is not supported by the evidence. We have examined the evidence and are of the opinion that there is ample support in the evidence for the verdict.

The defendant's next contention is that the court erred in refusing to submit to the jury a question, as requested, as to whether or not the defendant had the right to terminate

the contract. It was not claimed upon the trial that the contract was for any definite period and it was conceded that the defendant had the right to terminate it, and the defendant's contention that he had terminated the contract in October, 1913, was found against him. There being no claim on the part of the plaintiffs that the defendant did not have the right to terminate the contract and there being no claim on the part of the defendant that it was ever terminated at any time other than in October, 1913, the court was fully justified in declining to submit the question requested by the defendant.

By the Court.—Judgment affirmed.

MERRILL, Administrator, Appellant, vs. FOCHT, Executrix: MARTIN, Claimant and Respondent.

October 19—November 16, 1920.

Executors: Claims against estates: Corporations: Stock certificates not negotiable paper: Assignment under seal: Presumption as to consideration: Trial of claim in county court: Contest by creditor: Judgment: Costs.

1. Stock certificates are not "negotiable paper" within the meaning of sec. 1675—51, Stats., as such statute existed on July 10, 1913, providing that the indorsement or delivery of "negotiable paper" as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value.
2. The recital in an assignment of stock under seal to the assignor's creditor that it was given "for a good and valuable consideration to me in hand paid by P. [assignee], the receipt whereof is hereby acknowledged," is presumptive evidence of a sufficient consideration under sec. 4195, Stats., even though the security of past indebtedness be no consideration.
3. In proceedings against the estate of a decedent by a creditor claiming a lien on certain stock, in which the present claimant, also a creditor, appeared to contest allowance of the lien, involving merely the issue of whether the first creditor was

entitled to such lien, the judgment rendered was not conclusive as to whether the present claimant was entitled to a lien on the stock, his right thereto not being in issue.

4. Any creditor of the estate of a deceased person has an interest in the denial of any claim filed and may appear and oppose its allowance.
5. Where in such proceedings the contestant of the lien was the principal, if not the sole, objector to the allowance thereof, and the executrix made no appearance in the supreme court on claimant's appeal from the judgment disallowing the lien, this court, in reversing the judgment, will tax costs against contestant and not against the executrix.

APPEAL from a judgment of the county court of Green county: J. B. SIMPSON, Acting Judge. *Reversed.*

This is an appeal by claimant against the estate of Burr Sprague, deceased, from an order allowing the claim but denying a preference.

On November 15, 1912, Burr Sprague executed to Newton N. Palmer his promissory note for $2,500, secured by real-estate mortgage covering various descriptions of property, including his homestead, the title to which stood in the name of his wife. On November 11, 1912, said Sprague executed to one *Elizabeth Martin* his promissory note for $2,500, secured by 450 shares of the capital stock of the United Mercantile Agency, a South Dakota corporation. Prior to July, 1913, the United Mercantile Agency became insolvent. A new company was incorporated in the name of United Agency, which took over the assets of the old company, and the stockholders in the old company were granted the privilege of buying stock in the new company at the par value of $10 per share by paying therefor $1 per share. In July, 1913, Sprague secured 450 shares of stock in the new company by paying $450, and on July 10, 1913, in writing and under seal, assigned this stock with other personal property to Palmer as additional security for the $2,500 note. On November 11, 1913, Sprague and wife conveyed to Palmer the mortgaged premises, except the homestead, and two village lots not included in the mortgage.

November 15, 1913, Palmer executed to Sprague an agreement, in writing and under seal, to reconvey the various parcels of real estate and the various items of personal property to Sprague upon the payment by him of certain sums therein specified. Upon the death of said Burr Sprague said Palmer deeded to the administratrix of the estate of said Sprague, deceased, certain parcels, if not all, the real estate deeded to him by Sprague under date of November 11, 1913, and assigned to her the 450 shares of the capital stock of the United Agency, it being agreed that the administratrix was to convert all of said property into money and to pay the avails thereof to the said Newton N. Palmer in liquidation of the said Sprague indebtedness. A considerable portion, if not all, of the said property was sold by the administratrix, she realizing from the sale of the United Agency stock the sum of $3,400.

Elizabeth Martin filed her claim against Sprague's estate in the county court and claimed a preferential lien upon the United Agency stock and the proceeds arising from a sale thereof. Palmer also filed his claim against the estate, likewise claiming a preferential lien upon the said United Agency stock and the proceeds arising from a sale thereof. *Elizabeth Martin's* claim was first tried. The attorney for Newton N. Palmer appeared at the hearing and objected to a judgment according her a preference or lien upon the funds arising from a sale of the United Agency stock.

The county judge made and filed findings of fact and conclusions of law in which he found that *Elizabeth Martin* was not entitled to a lien on the proceeds of the sale of the said United Agency stock and entered judgment in favor of *Elizabeth Martin* for the amount of her claim, in which it was ordered and adjudged that the claim for preference and lien made by *Elizabeth Martin* against the United Agency stock be denied. As a conclusion of law the court found in the *Elizabeth Martin* case that the "turning over to Newton Palmer of the 450 shares of stock in the United

Agency as security or collateral for the debt against Burr Sprague was an illegal transaction and void, and, he having returned this stock to the executrix to sell, he had no preference or lien upon the said stock or the proceeds thereof."

Upon the hearing of the claim of Newton N. Palmer against the estate of Burr Sprague, deceased, *Elizabeth Martin* objected to the allowance to the said Palmer of a lien on the 450 shares of United Agency stock or the avails thereof. Upon the trial of that issue the county court allowed Newton Palmer the amount of his claim against the estate, but denied the lien claimed on the United Agency stock or the avails thereof. As already stated, the administrator of the estate of Newton N. Palmer appeals from that part of the judgment disallowing the claim for lien upon the United Agency stock.

For the appellant there were briefs by *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, and oral argument by *M. O. Mouat.*

For the claimant and respondent *Martin* the cause was submitted on the brief of *J. D. Dunwiddie* of Monroe.

OWEN, J. It is contended in this court that the county court properly disallowed Palmer's claim for lien on the United Agency stock, for two reasons: first, that there was no consideration for the assignment of July 10, 1913, by which Sprague assigned to Palmer the 450 shares of United Agency stock as additional collateral security for the $2,500 note executed November 15, 1912, and which was then held by Palmer; second, that the judgment of the county court in the matter of the claim of *Elizabeth Martin* against the estate of Burr Sprague is *res adjudicata* upon the question here involved. We will treat these contentions in their order.

To the point that there was no consideration for the assignment by Sprague to Palmer of the United Agency stock July 10, 1913, respondent relies upon the provisions of sec.

1675—51, Stats., as it then existed, which provided that the "indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value." The application of that provision of the law to the transaction is not apparent. The property delivered as additional security for the pre-existing debt was not negotiable paper, hence does not come within the provision relied upon. The assignment of the United Agency stock was in writing and under seal. It is recited therein that it was given "for a good and valuable consideration to me in hand paid by Newton N. Palmer, the receipt whereof is hereby acknowledged." This constitutes presumptive evidence of a sufficient consideration, even though the security of past indebtedness be no consideration. Sec. 4195, Stats.; *John A. Tolman & Co. v. Infusina,* 170 Wis. 433, 175 N. W. 916. There was no evidence in this case to rebut the presumption thus raised, and it must be held upon the record that the assignment was supported by a sufficient consideration.

The contention that the judgment of the county court in the matter of the claim of *Elizabeth Martin* against the estate of Burr Sprague, deceased, is *res adjudicata* upon the rights of the claimant herein, cannot be sustained. The right of the present claimant to a lien upon the proceeds of the United Agency stock was not there in issue. The only issue there under consideration was whether *Elizabeth Martin* was entitled to a lien upon the United Agency stock or its proceeds. Every creditor of the estate of Burr Sprague had an interest in the denial of the lien. It was proper for them to appear and oppose its allowance. This Palmer did. If during the proceedings his attorney asserted, *arguendo,* that not only *Elizabeth Martin* was not entitled to a lien on the stock but that Palmer was, the court acquired no jurisdiction to determine the question of whether Palmer had a lien on the stock. The judgment rendered upon that

claim was conclusive only upon the issues there presented, which involved only the right of *Elizabeth Martin* to a lien or preference upon this stock. No judgment rendered upon that claim could affect the right of the present claimant to a judgment against the estate for the amount of his indebtedness or to a lien upon the property in controversy. The principles dictating this conclusion are too fundamental to justify the citation of authority.

For a good and sufficient consideration Sprague, in his lifetime, assigned to Palmer the United Agency stock as collateral security for his indebtedness. Our attention is called to no act on the part of Palmer by which his lien upon the stock for such security has been released. In fact we do not understand that it is so contended. His claim for a lien is opposed rather on the ground that he never acquired any legal right to the security. It appearing that the stock was legally assigned to him and that such assignment was supported by a sufficient consideration, nothing remains to be considered. The county court erred in disallowing the claim for a lien upon the proceeds of the sale of the United Agency stock as claimed.

The executrix of the estate made no appearance in this court, and *Elizabeth Martin* seems to be the principal, if not the sole, objector to the allowance of the lien. The appellant should be allowed costs against *Elizabeth Martin* and no costs should be taxed against the estate.

By the Court.—Judgment reversed, and cause remanded to the county court with instructions to enter judgment allowing the claimant's claim for a lien upon the proceeds of the United Agency stock. Costs to be taxed as indicated in the opinion.

STATE EX REL. OSHKOSH TRUNK COMPANY, Respondent, vs. GOERLITZ and others, Appellants.

October 19—November 16, 1920.

Injunction: Disobeyance: Conviction for contempt: Nonappealable order.

1. A criminal contempt is an offense against the authority and dignity of the court, and the offense is public although committed in the course of private litigation.
2. No appeal lies from an order finding the defendants guilty of contempt and fixing punishment, and there is no authority in the court to stay proceedings and sentence.

APPEAL from orders of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Dismissed.*

The subject matter of this action is a controversy between the *Oshkosh Trunk Company*, an employer, and certain of its employees. Upon the verified complaint and supporting affidavits, certain of the defendants and others confederating with them were required to show cause why an injunction should not issue restraining them from doing certain things. The injunction was issued August 10, 1920, and was modified August 23, 1920. Subsequently there was an order to show cause why certain of the defendants should not be punished for criminal contempt by reason of the violation of the order entered August 10, 1920, as modified by the court on August 23d. Upon this hearing the court adjudged each of the defendants guilty of wilfully and deliberately violating the injunctional order and sentenced each of them to serve thirty days in the county jail, their sentences to begin at noon of the day each was sentenced. On behalf of one of the defendants there was, at the time of sentence, a motion for a stay of execution and a motion that the court fix bail, both of which motions were denied by the court. The same motions were subsequently made on behalf of the other defendants and were denied. On the 28th day of August a notice of appeal from the orders

adjudging the defendants guilty of contempt of court and ordering them confined in jail was served, the notice being filed September 6th. The sentence of the defendants *Goerlitz* and *Gordon* began August 27th, and that of the other defendants August 28th. On September 4th the court, by an order made *ex parte,* stayed the proceedings pending the determination of the defendants' appeal to this court and discharged the defendants from jail. On September 17th the defendants served and filed an undertaking on appeal.

For the respondent there was a brief by *Williams & Williams* of Oshkosh, and oral argument by *George E. Williams.*

[No appearance for appellants.]

ROSENBERRY, J. In this court the plaintiff and respondent moves that the appeal be dismissed, for the reason that no appeal lies under our statute from an order adjudging a party guilty of a criminal contempt. A criminal contempt is an offense against the authority and dignity of the court and therefore raises an issue with the court as the representative of organized society, and while such offenses may be committed in the course of private litigation the offense is none the less public in its nature. The question is, May a party disregard commands laid upon him by organized society acting through the courts, relying for justification upon his own judgment and in disregard of the established forms of law? A statement of this question is a sufficient answer to it. When courts are no longer obeyed, or their decrees are not enforced or may be set aside by individual action, then organized society will cease to exist, and each citizen must become the guardian of those entitled to his protection and the protector of their right to life, liberty, and the pursuit of happiness. In other words, society will revert to the primitive order. The power of the courts must be maintained if representative government is not to

fail. The order finding the defendants guilty of criminal contempt and fixing punishment was not appealable. *In re Murphey*, 39 Wis. 286; *State v. Mushied*, 12 Wis. 561; *Williamstown v. Darge*, 71 Wis. 643, 38 N. W. 187. Neither was there power or authority in the court to stay proceedings and sentence. *In re Webb*, 89 Wis. 354, 62 N. W. 177.

The seriousness of this situation, involving as it does the authority and dignity of the court, does not seem to have been appreciated. Its importance is not to be measured by the nature of the controversy between the parties. When the authority and the power of the court is brought in question there is no room for compromise, and the law should be upheld with firmness, courage, and dignity.

We are asked to consider some questions arising upon the merits. The order not being appealable, we have no jurisdiction here to do anything but dismiss the appeal.

By the Court.—Appeal dismissed.

SPANGLER, Respondent, vs. KITTEL and another, Appellants.

October 20—November 16, 1920.

Vendor and purchaser: Fraud: Statements recklessly made: Transfer taken in name of wife: Effect: Wife as bona fide purchaser.

1. A transaction whereby a husband, without consideration and by means of fraudulent representations, procured the title to the property of another to be transferred to his wife, so that if she be a good-faith purchaser the title will be lost to the true owner, is properly viewed with suspicion by the courts and should be very closely scrutinized on account of the inducements and facilities offered for fraud.
2. Where the wife, a woman of more than average intelligence and well able to take care of herself in business transactions and who knew her husband was having financial difficulties, received a deed from a grantor with whom she had never

had any dealings, which recited a consideration of $25,000, and in return therefor gave merely $5,000 of worthless bonds and assumed a mortgage of $12,000, without making inquiries from any person other than her husband, the deed, which had been procured by the husband from the grantor by fraud, will be canceled, the wife not being a *bona fide* purchaser, since under the circumstances she should have made inquiries, which would have revealed the fraudulent transaction.

3. One who induced another to enter into a contract for the exchange of real property by statements that the title to the land to be exchanged was merchantable and subject to only one incumbrance, and who procured a deed to plaintiff's land by the statement that a deed to the land to be exchanged therefor was ready for delivery, when in fact there was no such deed and the land was incumbered for more than $100,000 in addition to the stated incumbrance, was guilty of fraud, even though the statements were not knowingly untrue, since they were so recklessly in disregard of the truth as to be fraudulent.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to cancel deed. On June 9, 1916, the plaintiff was the owner of certain real estate in the city of Beaver Dam, on which were located two flat buildings. On that day he entered into a land contract with the Alfalfa Valley Land Company, a Minnesota corporation doing business in North Dakota, whereby it was agreed that the Land Company would sell and convey to the plaintiff 800 acres of land in McHenry county, North Dakota, for the sum of $29,600, being at the rate of $37 per acre. The plaintiff was to pay $600 as earnest money, $12,000 by the assumption of incumbrances on the North Dakota land, and agreed to pay the balance by conveying to the Land Company, or to such person as it might direct, the real estate situated in Beaver Dam, with the furniture and equipment, valued at $25,000, subject to a first mortgage of $6,500 and a second mortgage for $1,500, making the plaintiff's equity therein $17,000. It was agreed that each of the parties should

furnish an abstract and deliver possession by July 1, 1916. There was a provision, however, by which, if the title to the North Dakota property was not merchantable on the date of settlement, the Land Company should have a reasonable time thereafter in which to make the same merchantable. The plaintiff claimed that the making of such contract was procured by the false and fraudulent representations of one *Richard C. Kittel* as to the ownership and title of the North Dakota land, as to the state of the title and incumbrances thereon, and as to the financial responsibility of the Land Company. The trial court found against that contention and it is not pressed here. At the solicitation of *Kittel* the plaintiff executed a mortgage for $12,000 upon the Beaver Dam property, the proceeds of which *Kittel* was to apply toward the payment of the mortgages upon the Beaver Dam property, amounting to $8,000, the remaining $4,000 to be paid to the plaintiff for the purchase of cattle to be placed upon the North Dakota land, it being represented to the plaintiff that at that time a deed of the North Dakota land was on deposit in the First National Bank of Towner, North Dakota; that *Kittel* was a man of large financial means, high standing and reputation, whereas it appears as a fact that the North Dakota lands were heavily mortgaged, to a sum exceeding $100,000 in addition to the mortgage which the plaintiff was to assume, and that the Land Company had no right or authority to convey the real estate, had no abstract as represented, and that the company was in fact insolvent and bankrupt. On September 15, 1916, the plaintiff and his wife, at the solicitation of *Kittel,* executed a deed of the property situated in Beaver Dam in blank. It appears that the execution of such deed was procured from the plaintiff in reliance upon representations made to the plaintiff by *Kittel* as to the situation of the title, the financial responsibility of *Kittel,* and other representations. After *Kittel* had procured the deed he caused to be inserted therein the name of his wife, *Florence E. Kittel.* By the

terms of the deed she was to assume the $12,000 mortgage, and for the balance of the purchase price, $17,000, she delivered to her husband refunding bonds of the Northern Trading Company of the par value of $5,000. It was claimed by her that it was a pure investment upon her part, made without any knowledge of the transactions carried on between the plaintiff and her husband or any of the other defendants. She further claimed that she was the lawful *bona fide* holder in fee of the real estate, had taken possession of the same, and taken the rents and profits therefrom. The $12,000 mortgage on the Beaver Dam property passed into the hands of the First National Bank at Towner. Upon the opening of the trial the First National Bank of Towner stipulated that judgment might go against it without costs. At the close of the trial the court found, in addition to the facts stated, that the title to the North Dakota property was lost to the Land Company through a foreclosure of one of the liens upon it; that the bonds which *Mrs. Kittel* gave for the Beaver Dam property had no market value whatever and no actual value; that they could be used only for perfecting the title to some of the North Dakota property; that *Florence E. Kittel* did not know all about the dealings or about the details of the transaction between the plaintiff and her husband, but that she had sufficient knowledge to put her upon inquiry; that she knew her husband was in financial difficulty; that she knew that whatever rights her husband had in the Beaver Dam property he had acquired through a trade, but that she made no inquiry of any one, excepting her husband, to ascertain what the condition of the title was, the nature of the transaction, and was therefore not an innocent party, but took the same subject to all equities existing in favor of the plaintiff; that no fraud was practiced by *Mr. Kittel,* or any agent of his, or any of his companies, in procuring the original contract; that the value of both the Beaver Dam property and the North Dakota property was overstated in the contract; the value of the Beaver Dam property was $15,000, and the value of

the North Dakota property did not exceed $20 per acre, or $16,000; that neither the Land Company nor *Kittel* performed the contract as to the conveyance of the North Dakota land; that the plaintiff performed the contract so far as he was called upon to do so; that the deed to the Beaver Dam property was obtained by *Kittel* upon the representation that a deed conveying good title to the North Dakota lands was then on deposit in the bank; that it was necessary, in order to close out the deal, that the deed to the Beaver Dam property be given; that the contents of the deed were not misrepresented to the plaintiff; that the deed was presented to the plaintiff and his wife by *Kittel* and signed by them; that the record title to the North Dakota lands was in the Northern Trading Company; that there were liens and clouds upon the title which make it unmerchantable. There were formal findings and judgment for the plaintiff setting aside the deed from the plaintiff and his wife to *Florence E. Kittel,* restoring to the possession of the plaintiff the personal property and equipment situated in the apartment building on the Beaver Dam real estate, canceling the note and mortgage of $12,000 bearing date July 1, 1916, setting aside the assignment thereof to the First National Bank of Towner, North Dakota, barring the defendants, *Florence E. Kittel, Richard C. Kittel,* and the First National Bank of Towner, North Dakota, from any right in or to the premises, and for costs, from which judgment the defendants, *Florence E. Kittel* and *Richard C. Kittel,* appeal.

For the appellants there was a brief by *Clark & Lueck* of Beaver Dam, attorneys, and *Albert N. Eastman* of Chicago, of counsel; and the cause was argued orally by *A. W. Lueck* and *Royal F. Clark.*

C. A. Markham of Beaver Dam and *J. F. Baker* of Madison, for the respondent.

ROSENBERRY, J. It is contended on the part of the defendants *Kittel* that the trial court erred in finding that

Florence E. Kittel was not an innocent purchaser for value; and second, that the court erred in failing to dismiss the plaintiff's complaint for the reason that the plaintiff is not in court with clean hands. In addition to the facts above stated, it appeared that in July, 1916, the plaintiff moved his family upon the North Dakota farm, taking with him his horses, machinery, and household furniture, and proceeded to make extensive and valuable improvements upon the farm, erecting buildings and making preparations for occupying the farm during the following year. That the defendant *Richard C. Kittel* was guilty of fraud in the making of the representations by virtue of which he secured the execution of the $12,000 mortgage by the plaintiff and the execution of the blank deed by virtue of which the defendant *Florence E. Kittel* subsequently took title, seems to be amply established. The serious question in the case is whether or not *Florence E. Kittel* had knowledge of such fraud or of circumstances which charged her with notice. The trial court neither found, nor is it claimed, that *Florence E. Kittel* had actual knowledge of the facts and circumstances connected with the exchange of the properties in question. It is said that she knew that her husband was dealing extensively in real estate, that he was operating through several corporations which he controlled, and that the property described in the deed to her was a property involved in one of these transactions. She knew that her husband was in straitened financial circumstances and that these facts were sufficient to put her upon her inquiry. The answer of *Mrs. Kittel* to this contention is that there were no circumstances known to her which suggested a path of inquiry and that there was no path of inquiry which led to knowledge of the ultimate facts, to wit, that her husband had procured the execution of the deed through fraud and without consideration. *Mrs. Kittel* was a woman thirty-nine years of age, had been married to *R. C. Kittel* twelve years, and during that time had resided at Casselton, North

Dakota. She had been a school teacher, kept a bank account of her own, was a stockholder in the R. C. Kittel Company, knew of her husband's connection with the R. C. Kittel Company, the Northern Trading Company, and the Alfalfa Land Company. It appears that she was a woman of more than average intelligence, well able to take care of herself in business transactions. A transaction such as this, whereby, without consideration and by means of fraudulent representations, a husband procures the title to the property of another to be transferred to his wife so that if she be a good-faith purchaser the title will be lost to the true owner, is properly viewed with suspicion by the courts and should be very closely scrutinized on account of the great inducements and facilities afforded for the commission of fraud. *Hathaway v. Arnold,* 157 Wis. 22, 145 N. W. 780; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75. The deed by virtue of which she took title recited a consideration of $25,000. For this she gave $5,000 of refunding bonds of the Northern Trading Company and assumed a mortgage of $12,000. Although the deed ran from *Spangler* to her, she had never had any dealings with *Spangler.* She made no inquiries from him, or any one, as far as the record shows, as to what *Spangler* had received for the deed. The bonds which she gave as part payment of the purchase price were found by the court to be worthless, and were worthless except that under some contingencies, which do not clearly appear, they might have been used by *Kittel* in procuring a release of some of the prior liens on some of the lands traded to plaintiff. Although she came to Beaver Dam to examine the property described in the deed and ascertained the state of the title thereto, we are of the opinion that the trial court was right in holding that under all the circumstances she was not a *bona fide* purchaser without notice. In reply to this contention it is urgently and ably argued by her counsel that there was no path of inquiry open to her. It seems to us that upon very slight inquiry from any one con-

nected with the transaction, other than her husband, the true situation would have been fully disclosed. Inquiry from *Spangler,* who was in the state in which she was a resident, would have élicited the fact that he supposed a deed free and clear of incumbrances was on deposit in the bank. She knew of the liens against this property or could easily have ascertained the same. Inquiry at the bank would have disclosed the fact that no such deed was there, and there was abundant opportunity for ascertaining the true facts. In November, 1916, *Richard C. Kittel* pleaded guilty to a charge of unlawful banking and was sentenced to confinement, pursuant thereto. If in reliance upon the statements made by her husband she has been misled to her injury, that is a regrettable circumstance, but not material here. While the court hesitated to pronounce the conduct of *Kittel* in procuring the deed from *Spangler* to be fraudulent, we have no hesitation in so characterizing it. Whether he had an active intent to defraud the plaintiff or not, the statements which he made, if not knowingly untrue, were so recklessly in disregard of the truth as to be fraudulent. As against *Richard C. Kittel* there can be no doubt of the plaintiff's right to a full recovery. Having in mind the suspicion which naturally attaches to a transaction between husband and wife where a third party is deprived of his property, we are of the opinion that the trial court correctly held the defendant chargeable with notice as to the true state of the title and that she took the same subject to all the equities existing in favor of the plaintiff. It is very doubtful, indeed, if she has lost anything of value by the transaction.

The contention of the defendants *Kittel* that the plaintiff is not in court with clean hands is based upon the proposition that he very much overstated the value of the Beaver Dam property and that, by reason of such overstatement of value, *Richard C. Kittel* was unable to procure the necessary funds with which to clear the title to the Dakota prop-

erty. We find nothing in the record to substantiate this claim. The deed was drawn and prepared by *Kittel,* presented to *Spangler* and his wife, and signed by them. There is no testimony, so far as we can find, that any one relied upon the statement as to the amount of the consideration or in any way hindered the defendant *Kittel* in his operations, or that it was relied upon by *Mrs. Kittel.* So far as we are able to ascertain there was no element of bad faith in the conduct of *Mr. Spangler* in relation to any of these transactions.

By the Court.—Judgment affirmed.

SHADBOLT & BOYD IRON COMPANY, Appellant, vs. LONG and others, Respondents.

October 21—November 16, 1920.

Corporations: Subscriptions to stock: Fifty per cent. actually subscribed: Effect of subsequent agreements: Oral subscriptions: Personal liability of stockholder: Form of action.

1. An action to enforce the personal liability of subscribers to stock of a corporation under sec. 1773, Stats., on the ground that fifty per cent. of the stock had not been subscribed, is an action at law and is not governed by secs. 3223–3228.
2. Where there was testimony that two partners turned in their business to a corporation in return for $6,400 in stock, and at the first meeting of the stockholders agreed to subscribe for further stock, and fifty per cent. of the stock was subscribed at such meeting and the assets of the partnership delivered to the corporation, a judgment dismissing a complaint in an action by a creditor to hold stockholders personally liable because one half of the capital stock had not been subscribed will not be disturbed because of entries made in the stock books after the first meeting. The effect of the first subscription could not be changed by subsequent irregularities, mistakes, or new agreements.
3. An oral agreement to take $2,000 in corporate stock and a practically contemporaneous delivery of assets to the corporation in payment for $1,000 worth, is a single entire agreement, and the oral subscription was binding on both parties as to the $1,000 of stock not paid for. OWEN, J., dissents.

APPEAL from a judgment of the circuit court for Door county: A. H. REID, Judge. *Affirmed.*

This action was brought under sec. 1773, Stats., by a creditor of a bankrupt corporation, to enforce the personal liability of subscribers to stock, on the ground that fifty per cent. of the stock had not been subscribed as required by the statute.

The complaint alleged that the corporation had been duly organized in 1916 and had transacted business; that in 1917 it had become indebted to plaintiff for goods sold and the debt had not been paid; that the authorized capital stock was $20,000 and that fifty per cent. thereof had not been subscribed. The complaint then named the stockholders and the number of shares taken by them respectively; alleged the insolvency of the company, that there were many other creditors similarly situated, and that the action was brought also in their behalf; and prayed that the liabilities be determined and that the rights of all who should become parties be adjusted.

The answer admitted the formal allegations of the complaint, but alleged that at the first meeting fifty per cent. of the stock was duly subscribed and more than twenty per cent. had been paid before any business was transacted, and denied that it was necessary to resort to the statutory liability or that other creditors should be brought in.

In the fall of 1916 the defendants *Long* and *Hecht* were engaged in a garage business. They concluded to form a corporation and obtained certain subscriptions to stock, and a meeting of stockholders was held on December 29, 1916. At this meeting it was agreed that *Long* and *Hecht* should turn in their partnership business at a value of $6,400 in consideration for that amount of stock. At this point the conflict in the testimony arose.

It was claimed by the plaintiff that it was agreed that *Long* should receive $4,400 of the $6,400 of stock and *Hecht* $2,000, and that *Long* agreed to take an additional

$1,000 and to pay for it in cash. The defendants claimed that it was agreed at the meeting that *Long* should take $5,400 and *Hecht* $1,000 and that each agreed to take $1,000 more and pay cash for the same, thus making, together with the former subscriptions, fifty per cent. of the authorized capital stock.

Immediately after the meeting at which the mutual agreement was made the corporation took possession of the business and assets and continued until it became bankrupt. *Long* and *Hecht* made no written subscriptions to stock.

Several witnesses testified, in substance, to the effect that at this meeting each person was called on to state the amount of stock taken by him; that *Long* then said that *Hecht* had been worth $1,000 to him in the business and that he should have $1,000 of the stock to be issued for the partnership property, and that the remainder would be taken by himself. There was testimony that *Hecht* wanted a larger interest in the business and agreed to take $1,000 more. At the meeting of the subscribers there was considerable discussion as to whether there were subscriptions to the amount of fifty per cent., and the subscriptions oral and written were counted up and found, as they supposed, to be enough.

Soon after the meeting *Long* paid the corporation the $1,000 as agreed, and became entitled to $150 more of stock for unpaid salary. *Hecht* made no further payment.

Long, who seemed to be unfriendly to the other defendants, denied that it was the understanding that the stock to be allotted *Hecht* for his interest in the business was $1,000, but testified that it was to be $2,000 and that *Hecht's* interest in the business was equal to that amount.

By special verdict the jury found, in answer to three questions, (1) that at this meeting of subscribers it was agreed that in exchange for the partnership property $5,400 of capital stock was to be issued to *Long* and $1,000 to *Hecht;* (2) that at the meeting *Hecht* agreed to purchase

altogether 200 shares, being $2,000 of stock; (3) that *Long* agreed to purchase altogether 640 shares.

For the appellant there was a brief by *Kaftan & Reynolds* and *Minahan, Minahan, Minahan & Duquaine,* all of Green Bay, and oral argument by *Robert A. Kaftan* and *Hugh A. Minahan.*

W. E. Wagener of Sturgeon Bay, for the respondents.

JONES, J. The first assignment of error is that the trial court held the action to be legal and not equitable. The material part of the statute under which the action was brought is as follows (sec. 1773, Stats.):

"No such corporation shall transact business with any others than its members until at least one half of its capital stock shall have been duly subscribed; . . . and if any obligation shall be contracted in violation hereof, . . . the stockholders then existing, shall be personally liable upon the same."

It was urged that actions for the enforcement of liability under this statute must be governed as to practice by secs. 3223–3228. Sec. 3223 provides:

"Whenever any creditor of any corporation shall seek to charge the directors, trustees or other officers or stockholders thereof on account of any liability created by law he may commence and maintain an action for that purpose in the circuit court and may at his election join the corporation in such action."

The other sections provide for the taking of an account; for ascertaining the liabilities of the directors or other officers and stockholders and enforcing the same by judgment; for the distribution of the property of the corporation; that the court shall compel each stockholder to pay in the amount due and unpaid on the share of stock held by him or so much as shall be necessary to pay the debts of the corporation; that if the debts of the corporation remain unsatisfied the court shall proceed to ascertain the liabilities of the

officers and stockholders, adjudge the amount due, and enforce payment. The statute further provides that the court may by injunction restrain proceedings by other creditors against the defendant; that the court may require all creditors of the corporation to exhibit their claims within a specified time or be precluded from any share in the distribution under the judgment. Provision is also made for discovery of stock and property belonging to the corporation and for adverse examinations of officers and stockholders as to transfers of property of the corporation.

Several classes of actions have come to this court under various statutes to enforce the statutory liability of stockholders: (1) the personal liability of stockholders in banks, (2) for unpaid subscriptions to stock, (3) for the indebtedness to laborers, (4) under sec. 1773, the statute in question, for liability because fifty per cent. of the stock had not been subscribed.

In the first three classes of cases it has been held by this court that the actions to enforce liability are equitable and that all the parties interested should be joined. In some of these cases, for example *Sleeper v. Goodwin,* 67 Wis. 577, 31 N. W. 335; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776; *Foster v. Posson,* 105 Wis. 99, 81 N. W. 123; and *Day v. Buckingham,* 87 Wis. 215, 58 N. W. 254, language is used by the court on which appellant's counsel rely as support for the proposition that actions based on sec. 1773 are also equitable and should be brought under sec. 3223, quoted above.

In the first of these classes of cases the liability of the stockholder is for the benefit of creditors generally to an amount equal to the stock held in addition to the amount invested in the stock, and the time of such liability is limited. The statute provides for the mode of bringing the action, and, under certain conditions, for the reimbursement of the stockholders. Sec. 2024—44, Stats.

The liability of a stockholder for unpaid subscriptions is limited to the amount unpaid. The amount unpaid as well as the amount paid is regarded as a trust fund pledged for the payment of the debts of the corporation. The liability of a stockholder for the debts to employees is limited to the amount of stock held by him, and is confined to six months' service by the employee. Sec. 1769, Stats. The liability for doing business before fifty per cent. of the stock is subscribed is different from that in any of these, because there is no limitation or qualification as to the liability of the stockholder. His liability is primary and absolute, not to the corporation, but to every creditor. It does not depend on the amount of the stock, nor the continued ownership of the stock, nor upon the solvency of the corporation. The statute in no way limits the period of the liability.

Although the precise question raised by this assignment of error does not seem to have been decided by this court, several actions have come before this court and been brought as purely actions at law. *Zwietusch v. Becker,* 153 Wis. 213, 140 N. W. 1056; *Weston v. Dahl,* 162 Wis. 32, 155 N. W. 949. The only case we have been referred to or have found which construes the statute in question is *Flour City Nat. Bank v. Wechselberg,* 45 Fed. 547. In an able and full discussion, JENKINS, J., held that the remedy at law is adequate and that the action need not be brought under sec. 3223, Stats. We quote from the opinion, page 551:

"The liability is not only primary and absolute, but attaches immediately upon the contracting of the debt by the corporation, maturing upon the maturity of the debt incurred. By the very terms of the statute, the liability is upon the stockholders existing at the time of the contracting of the debt. It does not involve those who may afterwards become interested. A transfer of stock would not acquit one of liability, nor transfer such liability to his successor in interest. So, also, liability is to the particular creditor, not to the body of creditors. It is measured by the amount of the debt, not by the amount the shareholder has at stake in the cor-

poration. It is a separate liability to each individual creditor. Its enforcement is not postponed to the ascertainment of the assets of the corporation, nor dependent upon the winding up of its affairs, or the insufficiency of corporate assets. It consists with the continued life of the corporation. The shareholder, compelled to respond to the creditor for the debt of the corporation, may or may not have an action over against the corporation. That is matter personal to the shareholder, with which the creditor is in no way concerned. Equity has here nothing to act upon. There is here no community of interest, no marshaling of assets, no distribution. The case involves no one subject of equity jurisdiction. It is a simple question of liability of one party to the other. The remedy at law is all-sufficient to the occasion. It is the one that should be pursued."

We hold that the trial court did not err in treating the action as one at law.

Counsel for the appellant claim that in order to make up the necessary one half of the subscriptions there must be counted 100 shares of stock for which it is claimed *Hecht* made a separate oral subscription and for which he never paid. It is urged that any agreement to take such shares was void and in violation of the statute of frauds. On the other hand, it is claimed by respondents' counsel that *Hecht* agreed to take only 200 shares, one half of which was paid by the delivery of his interest in the stock of goods, and that the sale of the partnership goods by *Long* and *Hecht* to the corporation jointly and the individual promises to take 100 shares each were all one contract. On the motion for judgment the trial judge said:

"It appears to the court that the statute of frauds was fully complied with so as to render the oral agreements to take stock valid. The agreement of *Hecht* to take $2,000 face value was not divided into parts so as to constitute two contracts. In effect he agreed to take 200 shares and pay for one half thereof by the immediate delivery of his interest in the partnership property, and pay for the other half thereof in cash later. His interest in the partnership

property was immediately put into the possession of the corporation."

On this branch of the case the jury found for the respondents. If the facts which occurred at the meeting of the stockholders on December 29, 1916, are controlling, there was clearly sufficient evidence to sustain the verdict. There is evidence tending to support the claim of appellant as to the main facts, consisting of entries in the stock-books inconsistent with respondents' claims. It also appeared that the number of stock certificates actually issued to *Hecht* and *Long* did not correspond with the claim of respondents as to the agreement of December 29, 1916. But no certificates were issued until several months after that meeting. All these facts were before the jury and the trial judge and we do not feel justified in setting aside the judgment, since if the agreement to take the requisite amount of stock was made at the meeting and was accompanied by delivery of the assets of *Long* and *Hecht* the effect could hardly be changed by subsequent irregularities or mistakes or new agreements.

There is much discussion in the briefs concerning oral subscriptions for stock and the statute of frauds. In view of the conclusion we have reached as to the facts it does not seem necessary to enter upon a discussion of those subjects. The oral agreement to take the stock and the delivery of compensation for it were practically contemporaneous. All parties and the corporation acted upon the arrangement in good faith. As part of a single entire agreement one of the owners of the assets to be turned over agreed to take $1,000 in stock for which he never paid. The agreement was accepted and acted upon by the corporation. If action had been brought upon the promise he could not have repudiated it. There are conflicting decisions as to the validity of oral subscriptions to stock, but we have found none inconsistent with our conclusion, which is that on the facts found the required amount of stock was subscribed.

By the Court.—Judgment affirmed.

OWEN, J. (*dissenting*). I regret that more consideration was not given the question of whether an oral subscription to the capital stock of a corporation satisfies the requirement of sec. 1773, Stats. The trend of authority is to uphold the validity of such oral subscriptions, but it is recognized that the charter or governing statute may require the subscription to be in writing. 1 Thompson, Corp. (2d ed.) § 573; 14 Corp. Jur. 519. A consideration of the phraseology and obvious purpose of sec. 1773 convinces me that it requires actual written subscriptions of fifty per cent. of the capital stock before the corporation is permitted to do business with third parties. Until that time it shall not "transact business with any others than its members;" it is not a completely organized corporation; it does not come into possession of its corporate powers or privileges. Until that time the stockholders shall be personally liable for any obligations incurred. Manifestly the interest not only of the public but of existing stockholders requires the existence of definite record evidence of whether the organization has so far progressed as to constitute it in all respects a corporation in truth and in fact. To permit the establishment of that fact to depend upon the uncertainties of parol testimony and the vacillations of successive juries is a slipshod policy.

The verdict of the jury in this case rests upon very unsatisfactory evidence. In an action by another creditor the jury is more than likely to find the other way. Is it possible that the legislature intended that the question of whether a corporation is fully organized and is entitled to transact business should rest in such uncertainty? I think not, and I think this court plainly said so in *Weston v. Dahl*, 162 Wis. 32, 155 N. W. 949, where, of a similar subscription, it said: "Oral promises such as were made to take stock are not subscriptions for stock within the meaning of the statute." It is true that following this statement it is said: "They rested in parol, and by virtue of sec. 2308, Stats.

1913, could not be enforced." This does not seem to have been intended as an explanation or modification of the first proposition, but rather as an additional reason for declaring the oral subscriptions invalid.

No good purpose will be subserved by a prolonged discussion of the subject. Suffice it to say that, in my judgment, the legislature intended that the subscriptions to the capital stock should be in writing and preserved among the records of the corporation, affording those interested, the stockholders as well as the public, definite information as to its corporate status. It well may be that an oral stock subscription is valid under certain circumstances, so that it may be enforced at the suit of the corporation, when it is not valid for the purpose of affecting the corporate status. As to that I express no opinion.

I may add that in my judgment there is no evidence in the case of part performance so as to take *Hecht's* oral subscription for the $1,000 of the stock out of the statute of frauds. That was an individual subscription wholly apart from the sale of the partnership assets to the corporation. The sale of those assets did not constitute a part performance of *Hecht's* individual contract, and if the statute of frauds is applicable the transaction was invalid. For these reasons I dissent.

BRILL, Respondent, vs. RYAN, Sheriff, Appellant.

October 21—November 16, 1920.

Replevin: Evidence: Sufficiency.

Findings of the trial court that plaintiff, the owner of a department store, contracted with several persons to conduct sales in his store, and that they, without the knowledge of plaintiff, having attempted to incorporate, purchased goods under their purported company name, and, being unable to make settlement with plaintiff, surrendered the goods then in the store, including those purchased by them and not paid

for; that the plaintiff settled with mercantile creditors whose goods came into the store and the proceeds from which he received; and that he later purchased at an execution sale all the interest of the corporation in the goods, being amply sustained by the evidence, a judgment in an action for replevin awarding the goods to the plaintiff as against the sheriff, who had seized them under an execution against the company, is proper.

APPEAL from a judgment of the municipal court of Brown county: HENRY GRAASS, Acting Judge. *Affirmed.*

This action of replevin was brought by plaintiff against defendant, as sheriff, who had levied on property under two executions in favor of one B. E. Nicoll and against the Gasco Realization Company, a corporation, and Jacob Abrams, Bernard Skowron, and William Glenberg.

The complaint alleges that the plaintiff, on May 23, 1918, was the owner and lawfully entitled to the possession of merchandise valued in the sum of $800 and upward, and that on said date the defendant, as sheriff, wrongfully took the property described and unlawfully retained the same. The answer sets forth that on May 21, 1918, there were delivered to the defendant two executions in favor of B. E. Nicoll and against the Gasco Realization Company, a corporation, by reason of which the property in question was seized for the purpose of satisfying the two judgments specified in the executions, and that by virtue thereof defendant seized the property in question, and that said defendant believed the property to be that of the Gasco Realization Company and subject to such executions.

The case was tried by the court without a jury. The court found, in substance, that prior to November 1st plaintiff was the owner of a department store in Green Bay, Wisconsin; that subsequent to that date plaintiff entered into a written contract with Jacob A. Abrams, Bernard Skowron, and William Glenberg to conduct sales of stock in his store; that subsequent to the execution of this contract and without the knowledge or consent of the plaintiff, these three

men attempted to form a Wisconsin corporation under the name of the Gasco Realization Company, and obtained a charter therefor, no papers of incorporation having ever been filed with the register of deeds for Brown county, however; that under the name of the Gasco Realization Company said parties purchased from various wholesale houses goods, wares, and merchandise of the approximate value of $7,700 and claimed to have incurred other liabilities by way of borrowed money; that Abrams, Skowron, and Glenberg operated said store as the Gasco Department Store from about February 15th until about May 11th under the terms of the agreement with *Brill,* at which time, having been unable to make the payments to plaintiff as called for by their contract, they surrendered possession of the goods then in said store, including the unsold portions of the goods purchased by the Gasco Realization Company, to *Brill,* who has ever since been and now is in possession of the goods and who claims title thereto under the contract. The court also found that during the occupancy of the store by Abrams, Skowron, and Glenberg, or the corporation under which they attempted to operate, they had never been in possession of the store nor of the merchandise or fixtures; that all moneys taken in by the business during the period of such occupation were paid to *B. Brill* and by him deposited in his private banking account, and that he at all times had sole and exclusive control of such cash receipts; that the expenses of advertising under the name of the Gasco Realization Company, the Gasco Boys, and the Gasco Department Store were paid by *B. Brill* out of the proceeds received from the operation of the business, as were all other expenses of running and operating the store; that during the operation of the business goods purchased by the Gasco Realization Company were mingled with the *Brill* stock and were sold and the moneys received therefor taken over by *B. Brill;* that Abrams, Skowron, and Glenberg were the only stockholders of the Gasco Realization Com-

pany; that at the time they left Green Bay they were indebted to various persons, and executions on judgments against the Gasco Realization Company were returned unsatisfied; that B. E. Nicoll obtained two judgments against the company aggregating an amount in excess of $700; that upon executions issued on said judgments *Nic Ryan* as sheriff levied upon certain merchandise in the *Brill* store which had been purchased from wholesale houses by the Gasco Realization Company; that the Gasco Realization Company and Abrams, Skowron, and Glenberg have never paid to plaintiff anything whatsoever on account of the purchase price of said goods excepting the initial deposit as appears in the contract; that during the week commencing August 20, 1918, *Brill* purchased at an auction sale, under a judgment rendered against the Gasco Realization Company in favor of Morris Garfinkel and Paul Wachtel, all of the right, title, and interest and the equity of the Gasco Realization Company in said stock of merchandise; that the value of the goods seized by defendant under his execution is $800; that plaintiff had, prior to the trial of this case, settled with all merchandise creditors of Abrams, Skowron, and Glenberg, whose merchandise came to the store and the proceeds of which were realized on by *B. Brill,* the plaintiff; that none of the other alleged creditors of the Gasco Realization Company, including the defendant *Ryan,* were misled as to the actual relations of *Brill* with said company by reason of anything done or omitted by said *Brill;* that plaintiff, *Brill,* had no knowledge of the character of the advertising done by the Gasco Realization Company or that the business had been incorporated; that the plaintiff, *Brill,* acted in good faith throughout the entire transaction and had no intent to defraud creditors.

Judgment was entered in favor of the plaintiff and against the defendant. This is an appeal from such judgment.

Michael Levin of Milwaukee, for the appellant.

For the respondent there was a brief by *Kittell, Jaseph & Young* of Green Bay, and oral argument by *Lynn D. Jaseph.*

SIEBECKER, C. J. The trial court properly held upon the facts found in the case that the plaintiff obtained possession of the goods levied on by the sheriff under his contract with Abrams, Skowron, and Glenberg. It is apparent that under the terms and conditions of such contract plaintiff became the owner of the goods when he took exclusive possession of and paid for them. The finding of the trial court that the goods levied on by the sheriff were in fact in plaintiff's possession before such levy and that he in fact paid the purchase price due on them is well supported by the evidence and must stand. We think it is clearly shown that *Brill* in all his dealings throughout the transaction had no intent to defraud, and that the facts and circumstances pertaining to the joint enterprise between him on the one part and Abrams, Skowron, and Glenberg on the other do not establish any fraud impugning his *bona fide* ownership of the property levied on by the sheriff. It is also established that plaintiff, at an execution sale under the judgment of Garfinkel and Wachtel in August, 1918, obtained all the right, title, and interest that the Gasco Realization Company might possibly have in the property in question. It is considered that the findings of fact of the trial court are amply sustained by the evidence and that it properly awarded judgment thereon, and that plaintiff is entitled to the possession of the property levied on by the sheriff as owner, and that the defendant unlawfully seized them and wrongfully detained them from the plaintiff.

By the Court.—The judgment appealed from is affirmed.

MILES, Appellant, vs. CITY OF ASHLAND and others, Respondents.

October 21—November 16, 1920.

Municipal corporations: Authority of city to borrow money: Limitations: Street paving not ordinary expense.

1. The city of Ashland had the right to borrow money for the pavement of streets where in so doing it did not violate sec. 3, art. XI, Const., prescribing a limitation of indebtedness, or sec. 925—142*a*, Stats., limiting the amount of tax to be raised in a municipality in any one year, though the money so borrowed would exceed twenty per cent. of the levy for such purpose the preceding year, since money used for paving is not borrowed for "ordinary expenses" within the meaning of sec. 7, ch. 14, of the Ashland city charter (Laws 1889, ch. 27), providing that the common council may borrow money to pay the "ordinary expenses" of the city, not exceeding twenty per cent. of the tax levy for the same purpose the preceding year, and since money so borrowed would be used for lawful municipal purposes for which the city is expressly authorized to raise money by taxation.
2. Except as limited by charter, statutory, or constitutional provisions a city may borrow money for all lawful municipal purposes; that is, for the purpose of discharging the duties imposed on it directly or by implication by its charter and for which it can raise money by taxation.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Suit in equity by a taxpayer to enjoin the defendants from performing a contract for the paving of certain streets in the city of *Ashland* on the ground that the city had no power to borrow the necessary money to pay for the paving.

It was stipulated that

"on the 26th day of August, 1919, the common council of the city of *Ashland*, by more than a three-fourths majority—in fact all the members of the council except the plaintiff voting in favor of the proposition,—passed a resolution providing for the paving of certain streets and avenues mentioned in the plaintiff's complaint and at the same time

levied a tax on all the taxable property of the city, and that on the 27th day of August, 1919, in pursuance of said resolution the city borrowed from three different banks of the city, substantially the sum set out in the plaintiff's complaint [to wit, the sum of $42,000], and issued its certificates of indebtedness therefor, and that the same was placed in the special fund for the purpose of paying the city's portion of the contract in question, and thereafter and on the same date the contract was signed by the mayor and the city clerk and countersigned by the city comptroller; that the total tax levy for the year 1918 was $80,780.54, and that there was no levy made in 1918 for the purpose of paving or repaving any streets of the city, and that there was no money in a fund for the purpose of this contract prior to the placing of the amount there on August 27, 1919; and that the city had already borrowed prior to August 27, 1919, for current expenses, the sum of $20,000; that the city could still borrow the sum of approximately $95,000 and keep within its five per cent. constitutional limitation on August 27, 1919, and the levy of approximately $42,000 did not exceed three and one-half per cent. of the limitation of what could be levied as based upon the 1918 tax levy."

It was admitted that all the proceedings leading up to the making of the contract were regular and that the only attack was on the power of the city to enter into the contract and borrow the money. Upon the pleadings and facts stipulated the court found as conclusions of law "that the contract the city made with the defendant company is valid and binding and that plaintiff is not entitled to the relief demanded in his complaint." From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief signed by *Dillon & Tomkins,* attorneys, and oral argument by *J. J. Miles,* of counsel, all of Ashland.

For the respondents there was a brief by *W. Stanley Smith* of Ashland, attorney for the *City of Ashland* and city officers, and by *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh, attorneys for *J. Rasmussen & Sons Company;* and

the cause was argued orally by *Mr. Smith* and *Mr. John F. Kluwin.*

VINJE, J. It will be seen from the stipulation of facts that the borrowing of the money in question did not violate the constitutional limit of indebtedness, which limit is five per cent. of the value of the taxable property as determined by the last assessment for state and county purposes. Sec. 3, art. XI, Const. Neither did it run counter to the provisions of sec. 925—142*a*, Stats., limiting the amount of tax to be raised in a municipality in any one year to not to exceed three and one-half per cent. of the assessed valuation of that year. But it would violate the provisions of sec. 7, ch. 14, of the city charter (ch. 27, Laws 1889) that reads: "The common council may borrow money to pay the ordinary expenses of the city, not exceeding twenty per cent. of the tax levy for the same purpose the preceding year," if this money was borrowed for "ordinary expenses." So the question arises, Was the money borrowed for ordinary expenses? It is of course the duty of a city to maintain suitable streets for the use of the public, and in later times and in cities of considerable size the paving of streets is common and expensive. Indeed, it may equal all the other expenses combined. Owing to this fact, and that, at least as to any street that is paved, it is not annually recurring, but recurs only at long intervals, it cannot be said to be an ordinary expense but a special one. This is emphasized by the long, complex statutory provisions that are made for meeting such expenses. This was the view expressed by the trial court, and we think it is the correct one. Except as limited by charter, statutory, or constitutional provisions a city may borrow money for all lawful municipal purposes; that is, for the purpose of discharging the duties imposed upon it directly or by implication by its charter and for which it can raise money by taxation. 19

Ruling Case Law, 779 *et seq.* The paving of streets is such a purpose, and express power to tax for such purpose is given by statute. The defendants contend that under the implied powers of a city as defined in *Mills v. Gleason,* 11 Wis. 470; *Gilman v. Milwaukee,* 61 Wis. 588, 21 N. W. 640; *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885; *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 80 N. W. 1113; *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153; and *Milwaukee v. Raulf,* 164 Wis. 172, 159 N. W. 819, the borrowing would be justified. We prefer to rest it upon the express power given cities to raise money by taxation for street paving.

By the Court.—Judgment affirmed.

BEHLING, Respondent, vs. POSORSKE, Appellant.

October 21—November 16, 1920.

Replevin: Failure of sheriff to file papers: Trial: Motion for directed verdict: Waiver of jury trial: Confusion of goods: Appeal: New trial on issue involving error.

1. Where the jury in rendering a special verdict answered all except one question submitted to it, a motion to direct a verdict, made after such special verdict had been received, is not a waiver of the right to a jury trial as to such question.
2. In replevin the sheriff's failure to file plaintiff's papers within twenty days after taking the property as required by sec. 2728, Stats., is not ground for dismissal of the action, where defendant was not injured by the delay, such delay not operating to divest the court of jurisdiction.
3. In a replevin action to recover possession of forest products, where plaintiff's property had been wrongfully commingled with that of defendant because of a mistake as to the boundary line between the properties, defendant was entitled to a return of his property remaining after plaintiff's claim was satisfied, and upon inability to return such property was entitled to a judgment for its value without damages for its seizure under the writ of replevin.
4. Where it was stipulated that one of three boundary lines was the true line, and where all questions relating to damages

have been found by the jury, upon return of the record because of error the trial court should proceed to a jury trial as to the question of boundary only, unless the parties, in the exercise of the court's discretion, be relieved of their stipulation, in which event the matter of damages would be retried.

APPEAL from a judgment of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Reversed.*

Replevin. This action is brought to recover the possession of certain forest products cut and removed by the defendant from the plaintiff's land. There was a special verdict. In answer to the first question the court found facts which sustained the plaintiff's contention in regard to a disputed boundary; found that from the disputed strip the defendant had taken seven cords of pulp wood, 3,940 feet of logs, and seven and five-tenths cords of bark; that the sheriff seized thirteen and one-half cords of bark of the market value of $100, thirty-one cords of pulp wood of the market value of $144.65, and 10,000 feet of logs of the market value of $110.02. The value of the bark was fixed at $9.50 per cord, of the pulp wood at $4.66 per cord, and of the logs at $11 per thousand feet. It appeared that the products cut from the disputed strip were intermingled with others, the title to which was in the defendant, and that the value of the plaintiff's product was $181.53. That the total value of the product seized by the sheriff was $375.70. The plaintiff had judgment accordingly for six cents damages, $107.19 costs, and $181.53 damages, and there was found due to the defendant $194.17 on the theory that the property seized by the sheriff could not be returned to the defendant. From the judgment so entered the defendant appeals.

E. H. Schwcppe of Medford, for the appellant.

For the respondent the cause was submitted on the brief of *Herman Leicht* of Medford.

ROSENBERRY, J. The defendant complains that the court erred in answering the first question submitted to the jury.

Upon the trial it appeared that there were three lines, the Logan, the Henry, and the Franzen line. The parties stipulated that one of these three lines was the correct line. After the case had been submitted to the jury, the jury came into court and announced that they had agreed upon the answer to all of the questions submitted excepting the first, which was: "What is the true line between the plaintiff's land and the northwest quarter of the southwest quarter and the southwest quarter of the northwest quarter of section 27, township 33 north, of range 1 east, the so-called Logan line, the Franzen line, or the Henry line?" It appearing that the jury had been unable to agree, the plaintiff moved the court that the court insert as the answer to the question, as a matter of law, the Henry line. The defendant thereupon moved the court to answer question No. 1, without waiving the rights to the jury's answer, the Franzen line. Upon these motions the court directed that question No. 1 be answered by inserting "the Henry line."

A careful review of the evidence convinces us that there was sufficient evidence which, if believed by the jury, would have sustained a finding, at least as to the Logan line. The motion to direct a verdict having been made after the verdict had been received, at least to the extent of reading that part of it relating to damages, we think there was no waiver of the right to a jury trial, and that therefore the court erred in answering question No. 1 as it did.

"Sec. 2728. Stats. The sheriff shall file the notice, affidavit and undertaking given by the plaintiff, with proof of service thereof, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein."

Defendant argues that the action should have been dismissed by reason of the failure of the sheriff to file the papers within the time limited. The failure of the sheriff to file the papers within the time required by sec. 2728 does not operate to divest the court of jurisdiction, which is the

only theory upon which the motion to dismiss could be sustained. It is not claimed that any injury resulted to the defendant or that he was in any way put to a disadvantage by reason of the omission of the sheriff. The papers were subsequently filed, and the defendant's motion to dismiss was properly denied.

In the replevin proceedings the plaintiff described his property as one pile of bark south of depot, six piles of pulp wood west of track, south of depot, two piles of logs north of mill, two piles of logs northeast of mill, all in the village of Chelsea, in said county. As before stated, it appeared upon the trial that of the property so seized by the sheriff and delivered to the plaintiff a part belonged to the plaintiff and a part to the defendant. Assuming that the property was wrongfully commingled by the defendant, he was, under the facts in this case, nevertheless entitled to a return of the property remaining after the claim of the plaintiff was satisfied, and if the property had been disposed of by the plaintiff and return thereof was impossible, the defendant claims that he is entitled to judgment for the value of the property so taken, return of which cannot be made. The judgment was:

"That the plaintiff, *Edward Behling,* do have and recover the possession of the property hereinbefore described as taken from plaintiff's land by the defendant of the value of $181.53, as hereinbefore found, and the balance of the value of $194.17, as heretofore found, is due the defendant from the plaintiff, and that the plaintiff recover six cents damages and $107.19 costs."

The defendant contends that under the doctrine laid down in *Lanyon v. Woodward,* 65 Wis. 548, 27 N. W. 337, he is entitled to judgment for the excess. The plaintiff contends that under *St. Paul B. Co. v. Kemp,* 125 Wis. 138, 103 N. W. 259, the defendant having intermingled the plaintiff's property with his own, the defendant is entitled to have what the judgment gives him, a return of the property, or

where, as here, it has been disposed of, its value, without damages, for its seizure under the writ of replevin. The question of whether or not the defendant was entitled to judgment does not seem to have been considered in *St. Paul B. Co. v. Kemp.* In that case the judgment went for the plaintiff for the whole of the intermingled property, including the defendant's portion thereof. The court says:

"Respondent [plaintiff in replevin] was entitled to the logs seized, and to its full proportion out of the entire quantity of lumber seized, namely, 6,000 feet, and the costs of the action; and appellant was entitled to a return of the excess of the lumber so seized, or, if the lumber could not be returned, to its value, without any damages for the seizure of such excess under the writ of replevin."

Sec. 2888 provides:

"If the property have been delivered to the plaintiff and a defendant claim a return thereof judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same."

The return of the excess of the lumber so seized, referred to in *St. Paul B. Co. v. Kemp,* refers to the return to which the defendant is entitled under the provisions of sec. 2888. The defendant was therefore entitled, it appearing that the property could not be returned, to a judgment for its value, without damages. The matter of costs must be disposed of in accordance with the ruling in *Lanyon v. Woodward, supra.* See, also, *Freed F. & C. Co. v. Sorensen,* 28 Utah, 419, 79 Pac. 564, 107 Am. St. Rep. 731.

The parties having stipulated upon the trial that one of the three lines mentioned was the true line and the jury having found the damages with reference to each of these lines, no useful purpose would be served by a retrial of the question of damages unless the parties should, in the exercise of the court's discretion, be relieved of the stipulation entered into relating to the lines, in which event, of course, the matter of damages would again be thrown open to in-

vestigation. Upon the return of the record to the circuit court, the court should proceed with a jury trial as to the first question, and upon the determination thereof should render judgment accordingly, leaving that part of the verdict relating to damages undisturbed, excepting under the contingency mentioned. This procedure is directed under the provisions of sec. 2405*m*, Stats. *Knudson v. George*, 157 Wis. 520, 147 N. W. 1003.

By the Court.—Judgment reversed, and cause remanded for a new trial according to this opinion.

STATE EX REL. MACKMILLER, Appellant, vs. BOUSLEY, Town Clerk, Respondent.

October 21—November 16, 1920.

Taxation: Assessment of personal property: Presumption of correctness of assessment: Goods on car: Ownership: Goods in warehouse awaiting shipment.

1. Where a tax assessor found a carload of whisky consigned to a wholesale liquor dealer, his determination that the whisky belonged to and was assessable to the dealer was presumptively correct and could be overturned only by some direct evidence impeaching it, so that the dealer's statement before the board of review that title did not pass to him until he had paid for the liquor was insufficient to impeach the assessor's determination, such statement being but a conclusion of the dealer.
2. Packages of whisky in the warehouse of a wholesale liquor dealer, ready for shipment and addressed to parties residing outside the state, should not have been assessed to the dealer as agent, but as owner, since under sec. 1684*t*—46, Stats., title thereto did not pass from the dealer until delivery to the railroad company; but where the whisky was properly assessable to him as owner, he cannot, on *certiorari* to reverse the decision of the board of review, complain that it was assessed to him as agent.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Common-law *certiorari* to reverse the decision of the board of review for the town of Iron River, Bayfield county, Wisconsin, for the assessment of certain property of the relator in the year 1919. From the decision of the circuit court sustaining the decision of the board of review relator brings this appeal.

For the appellant there was a brief by *E. Sauve* of Iron River and *Lamoreaux & Cate* of Ashland, attorneys, and *Luse, Powell & Luse* of Superior, of counsel; and the cause was argued orally by *L. K. Luse*.

William F. Shea of Ashland, for the respondent.

OWEN, J. The relator is a wholesale liquor dealer at Iron River, Wisconsin. On the 1st day of May, 1919, the assessor of the town of Iron River assessed to the plaintiff 625 cases of whisky which had been shipped to him by Julius Koesler & Son and was then in a freight car in the railroad yards at Iron River. He also assessed to the relator, as agent for various parties, 152 cases of whisky. Relator claims he did not own the 625 cases of whisky then in the railroad yards, and that the 152 cases were improperly assessed to him as agent. The evidence taken before the board of review shows that on the 1st day of May the assessor went to the Northern Pacific freight depot and asked if any shipment of liquor had been received for any parties at Iron River on that day, and the agent informed him that a carload had come to *Mr. Mackmiller*. He asked to see the freight bill, and, upon looking at same, found that the carload consisted of 625 cases of whisky shipped from Julius Koesler & Son, and that it was on the track at that time.

The relator appeared before the board of review and testified that on December 6, 1918, he bought 10,000 cases of whisky from Julius Koesler & Son and paid thereon $30,000, or $3 per case, and that the carload in question was a partial delivery on that purchase. He insisted that he

did not own the whisky until he paid for it, but he did not disclose the terms and conditions of the contract of purchase, nor offer any evidence as to the usual course of business between him and Koesler & Son throwing any light on the question of when, under their contract, or according to their usual course of dealing, title passed from Koesler & Son to him.

"Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, . . . unless a contrary intent appears." Sub. 1, sec. 1684*t*—46, Stats.

To be sure, the shipper may retain title to the goods or reserve a lien thereon as security for the payment of the purchase price. See Williston, Sales, sec. 282 *et seq.* There is no evidence in this case, however, sustaining the contention that the title to these goods did not pass to relator when they were delivered to the common carrier. This claim made before the board of review on the part of the relator was supported only by his statement, in the nature of a conclusion, to the effect that the title to the goods did not pass until he had paid therefor. The bill of lading was not introduced in evidence nor did the evidence disclose to whom the whisky was consigned or to whom the bill of lading was sent. It appeared, however, from relator's own books that the whisky was unloaded from the car on the 5th day of May, and it was stipulated that the draft for the purchase price was paid on the 6th day of May. This is not consistent with his statement that he had no right to unload the car until the draft therefor was paid. The situation, therefore, is this: The assessor found this carload of whisky on the track at Iron River consigned to the relator. His natural and legitimate conclusion was that it belonged to relator and he assessed it to him. His determination in this

respect was presumptively correct. It could only be overturned by some definite evidence impeaching it. *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566. The evidence of relator before the board of review was not sufficient for this purpose. The action of the board of review in sustaining the assessment made by the relator cannot be disturbed.

As stated, relator was a wholesale liquor dealer. On May 1st there was in his warehouse a number of packages of whisky ready for shipment and addressed to various parties residing at Virginia and Aurora, Minnesota. The assessor assessed the amount of this liquor to relator as agent. We have been unable to see why this should have been assessed to him as agent. It appears plainly enough that the relator was to deliver these parcels to the railroad company to be forwarded to the respective purchasers at the above named points. Until delivery to the railroad company the title did not pass from relator (see sub. 1, sec. 1684*t*—46, Stats.), consequently he was the owner of this liquor on May 1st and the amount thereof was properly assessable to him as owner. It being properly assessable to him as owner, he cannot complain because it was assessed to him as agent. It follows that the judgment of the lower court sustaining the action of the board of review should be affirmed.

By the Court.—Judgment affirmed.

LEPAK and others, Respondents, vs. LEPAK and wife, imp., Appellants.

October 21—November 16, 1920.

Deeds: Consideration: Covenants for the benefit of third persons: Discharge: Trial: Failure to object to improper testimony.

1. Where parents deeded their farm to their son on condition that he support them for life and make certain payments to other children on their becoming of age, and agreed that, upon a sale of the farm by the son, they would accept $1,000 in satisfaction of their rights, and subsequently, when the farm was sold by the son and the agreed sum paid them, they executed a quitclaim deed, a finding of the court as to the understanding of the parties when the quitclaim deed was made will not be disturbed, although parol evidence was received, as this line of testimony was not objected to by appellant but was in fact first offered by him.
2. Where a grantee in a deed, as part of the consideration, agreed to pay money to third parties, the situation of debtor and creditor arose between the grantee and such persons, even though no consideration passed from them and irrespective of whether they knew of the conveyance or not.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This was an action of an equitable nature brought by a brother and three sisters of appellant *John Lepak* to recover from him $200 each, with interest from the date that each, respectively, became twenty-one years of age.

On June 23, 1906, and for many years previous thereto appellant *John Lepak* lived with his parents upon their farm. On that date, by a deed duly executed by the parents and accepted by the said *John Lepak,* the former conveyed to the latter a portion of their farm. The deed, so far as material to this appeal, read as follows:

"Theodore Lepak and Rozalya, his wife, . . . hereby convey . . . to *John Lepak,* . . . for the sum of two thousand dollars ($2,000), the following tract of land, . . . as a further consideration said *John Lepak* shall pay and give

to said Theodore Lepak and wife each year during their natural lifetime the following: Five barrels of wheat flour, 5 pounds unspun wool, 4 bushels wheat, 400 pounds pork, 10 pounds butter, 10 bushels potatoes, 10 pounds coffee, 40 bars soap, 4 bushels peas, and always furnish them with two milch cows with sufficient hay and straw and pasture for same. Also to allow said Theodore Lepak to fish in said pond on said premises and to allow Stanislaus Lepak to cut ice on pond on said premises. Also to pay to the following heirs the following sums of money: To *Mary Lepak* $200, to *Anna Lepak* $200, to *Pauline Lepak* $200, to *Valentine Lepak* $200, to Salamonia Lepak $200, and to Peter Lepak $200, said sums are payable to respective parties when each is twenty-one years of age, without interest. Also to furnish said Theodore Lepak and wife with 6 cords of fire wood each year, also to allow them the free use of his team in case of need. In case said *John Lepak* should sell said premises he shall pay to said Theodore Lepak and wife the sum of one thousand dollars ($1,000), for which they agree to satisfy the above agreement."

Thereafter, in 1912, some trouble having apparently arisen between *John* and his mother, *John* conveyed the land to his sister-in-law, paid $1,000 to his parents, and received a quitclaim deed executed by them. This deed, so far as material here, read thus:

"Theodore Lepak and Rozalya (his wife) . . . in consideration of the sum of one thousand ($1,000) dollars to them duly paid, do hereby . . . quitclaim unto *John Lepak* . . . all the right, title, interest, claim, and demand which said parties of the first part have in the following described real estate: . . . This deed is given to satisfy a certain agreement made under date of June 23, 1906, between Theodore Lepak and wife, Rozalya, and *John Lepak*, in deed . . ." (here describing the deed hereinbefore quoted).

After these transactions were completed the sister-in-law deeded back to *John*.

The oldest four of those named as beneficiaries of the payments provided in the deed of 1906, having become of age and not having been paid, brought this suit to recover

the amounts alleged to be due. *John Lepak* answered that his parents promised to pay him for services or deed him their farm if he would continue to work for them after reaching twenty-one; that he had so continued to work for them, and that his services were worth more than $2,000, at which figure he valued the farm received by him at the time of the conveyance; that he had sold the premises and that his parents had fully satisfied the agreement (conditions) set forth in the deed; and that in any event one plaintiff was barred by the statute of limitations, she having become of age more than six years prior to the commencement of this action.

The scrivener of the deed of 1906 was permitted to testify, subject to defendants' objections, in regard to the $1,000 payment provided therein to be made in case the farm was sold, that the parents did not care to deal with strangers in getting the articles mentioned; that this was the understanding, and not that the children's interests should also be quitclaimed. Testimony relating to the quitclaim deed was introduced without objection by appellants, both that it was understood that the children's interests were thereby released, and the contrary.

The trial judge found as facts that the premises conveyed were then worth $2,200 and that personal property worth $300 was also delivered; that the total consideration for both land and personal property agreed to be paid was the payments of $200 each and the provisions to be furnished; that appellant *Lepak* and wife in form sold and conveyed the land, paid the $1,000 provided for, and received from his parents a quitclaim deed of their interest; that thereupon, in pursuance of the same transaction, the land was reconveyed to *John Lepak;* that these conveyances were made for the purpose of enabling appellant *Lepak* to borrow money upon the lands sufficient to pay the obligation of $1,000 to his parents; and that at the time of the transactions in 1912 it was understood and agreed between appel-

lant *Lepak* and his parents that the obligation to pay the several sums of $200 each should be unaffected by said transactions. The judge made no findings with reference to an agreement of the parents to give *John* the farm in return for his services to them, and to his failure so to find appellants excepted.

The trial judge concluded that three of the plaintiffs were entitled to recover, the fourth being barred by the statute of limitations, and to have a lien upon the land as for unpaid purchase money. From a judgment entered accordingly this appeal is taken.

The cause was submitted for the appellants on the brief of *A. L. Smongeski* of Stevens Point, and for the respondents on that of *Bird, Okoneski & Puchner* of Wausau.

JONES, J. The conveyance relied on in this case is an interesting illustration of the agreements so often made for support between parents and a child. If it were not for the last clause, in which satisfaction of the agreement is provided for in case *John* should sell the land and pay his parents $1,000, there would be no doubt but that he would be liable for the payments to the other children. The case would then be governed by the rule in *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, and other cases. Under that rule, the grantee in the deed having as part of the consideration agreed to pay sums of money to other persons, they would have become his creditors even though no consideration passed from them and whether they knew of the conveyance or not. Having vested rights, their claims could not have been discharged without their consent.

It is claimed by counsel for appellants that there is no ambiguity in the conveyance, and that it provides for its own satisfaction by the sale of the farm and the payment of $1,000 to the parents. It is also claimed by counsel for respondents that there is no ambiguity in the writing, but they arrive at an entirely different conclusion and construe

it to mean that it could not be satisfied without the consent of the other children.

Parol evidence was received as to the surrounding circumstances when this conveyance was made and of the understanding of the parties. There may be grave doubt whether such evidence was properly admitted, but in view of other evidence in the case it becomes unnecessary to decide this question.

Testimony was received that when the second conveyance, the quitclaim deed, was made from the parents to *John,* which purported to satisfy the former agreement, it was understood and agreed that the obligation to pay the several sums of money to the children was not intended to be released thereby. We have examined the record as well as the printed case and find that this testimony was not objected to by counsel for the appellants. In fact testimony on this subject was first offered by him. The trial court found that the above was the agreement and understanding at the time of making the quitclaim deed, and we see no reason to disturb the finding of the court.

By the Court.—Judgment affirmed.

WILL OF SHANKS: SYTH, Executor, Appellant, vs. SHANKS, Respondent.

October 21—November 16, 1920.

Wills: Testamentary capacity: Insane delusion affecting disposition of property: Unnatural disposition: Costs: Unsuccessful attempt to probate: Costs in supreme court: Failure to follow rules.

1. In a wife's contest of her husband's will on the ground that the husband, at the time of executing the will, was laboring under an insane delusion that the wife had been unfaithful, statements in the will that testator had wrongfully accused his wife of infidelity and that he regretted having made accusations are insufficient, under the evidence, to warrant the

court in setting aside a finding that the husband had been laboring under such delusion at the time of making the will.

2. Where the wife, prior to the husband's execution of the will, had for more than fifty years been a faithful wife and had helped him to accumulate his property, his will, executed under an insane delusion as to the wife's fidelity, which left her almost nothing for support in her old age, was properly refused probate, it being reasonably certain that but for such delusion she would have received a materially larger share of the estate.
3. The test as to the validity of a will executed by one laboring under an insane delusion is not whether testator had general testamentary capacity, but whether the insane delusion materially affected his will.
4. In a proceeding to probate a will by one named executor, wherein the executor merely sought to sustain the will by such competent testimony as was obtainable, it was improper for the county court, in disallowing probate of the will, to adjudge costs in the county court against the proponent, he having merely performed his duty.
5. Under Supreme Court Rule 44, an appellant who has printed his case by question and answer instead of in narrative form, and has printed much of the record not necessary to any question raised by the appeal, will not be allowed costs for the printed case.

APPEAL from a judgment of the county court of Clark county: H. A. ANDERSON, Judge. *Modified and affirmed.*

Proceedings to probate the purported will of John Shanks, deceased, proposed for probate by *John Syth,* the executor named therein. At the close of the evidence the court found as facts that said John Shanks for some time prior to the making of his will was suffering from insane delusions; that at the time he made his will he was mentally unsound and incapable by reason thereof to execute the will; and held that his will should be disallowed. From a judgment disallowing the will and requiring the proponent to pay costs the latter appealed.

Emery W. Crosby of Neillsville, for the appellant.

For the respondent there was a brief by *Rush & Devos* of Neillsville, and oral argument by *W. J. Rush.*

VINJE, J. On the 17th day of February, 1919, the testator, John Shanks, executed his will devising to his wife the use for life of his homestead and household furniture, valued at about $4,000. He also bequeathed her $3,000. The balance of his property, valued at $5,000, exclusive of the homestead, he left to his nephews and nieces. On the 9th day of March, 1919, he committed suicide by hanging. He was then eighty-two years old and had lived amicably with his wife, aged seventy-two years, for over fifty years before his death, and the property he left had been accumulated by them during their married life. It appears from the evidence, and there is basis therein for the finding of the trial court, that in the fall of 1918 the testator became the victim of the insane delusion that his wife was criminally intimate with a neighbor, a man of mature years having a wife and children and grandchildren, and, as the evidence shows, a man of unquestioned virtue and integrity. The evidence further shows that there was no appearance or facts that could form any rational basis for the delusion. It was regarded as utterly unfounded by every one but the testator. On the 10th day of December, 1918, he was adjudged insane and committed to the state insane asylum at Mendota, where he remained till February 10, 1919, when he had a rehearing and was adjudged sane by a jury and was released from further custody. The proof shows, however, that he still harbored his insane delusion and did so on the morning of the day of his suicide. Before 1918 he had always expressed his intention to leave all his property to his wife—they having no children or grandchildren living.

In his will occurs this statement:

"I have always been a man of violent temper and a jealous disposition. That some time in the fall of 1918 I became very angry with my wife and in the heat of temper wrongfully accused her of infidelity. I was sorry that I did this and immediately told her that I did not believe such

things, and I wish it to be understood in this my last will and testament that such statements were made while violently angry and jealous, and I am sorry that I made those statements. I wish to further state that I have no feeling of enmity or jealousy against my good wife, and that when my temper sufficiently cooled I knew I had wrongfully accused her, and wish to state that I believe her to be perfectly honorable and a good, virtuous wife, and that my feelings towards her are in no way bitter at this time, and I have tried by this will to properly take care of and leave enough to protect her as long as she shall live."

It is claimed that this negatives the fact that at the time of the execution of the will he was laboring under any insane delusion or was mentally incompetent to make a valid will. Were it not for the well known propensity of insane persons, or those suffering from insane delusions, to negative their true state of mind or to be unaware of it, more importance might be attached to the statement made in the will. Upon a consideration of all the evidence we deem that sufficient weight cannot be given it to set aside the findings of the trial court. The real facts are not much in dispute. The only material issue is whether the trial judge was warranted in finding from them that the insane delusion affected the testator in the making of his will to such an extent that but for the insane delusion his will would have been materially different. It seems to us that he was. *Barbo v. Rider*, 67 Wis. 598, 31 N. W. 155; *Bachmeyer v. Mutual R. F. L. Asso.* 87 Wis. 325, 58 N. W. 399. It is not a question whether testator had general testamentary capacity, for many persons laboring under insane delusions may be competent to make a will (*Will of Cole*, 49 Wis. 179, 5 N. W. 346), but whether the insane delusion under which the testator suffered materially affected the will he made. In other words, is it reasonably certain that but for the insane delusion his wife would have received a materially larger devise? If that is reasonably certain, then mental incapacity is sufficiently shown to invalidate the will made. Ann. Cas.

1916C, 4. There is no good reason shown why, under the circumstances of this case, the testator should not have left all his property to his wife, who for fifty years had helped earn it and whose needs required the income of all of it, if not the principal or a part thereof, for her support. By the will she was required to pay taxes and keep up the homestead. This, it is shown, would nearly exhaust the income of the $3,000 given her, leaving her almost nothing for support in her old age. A sane man would not do that to a wife who for over fifty years had faithfully performed all the duties of wifehood—especially so where, as here, his nephews and nieces had little claim upon his bounty.

John Syth, the appellant, was named executor in the will and propounded it for probate. Costs were adjudged against him in the county court. This we think should not have been done. It was his duty to propound the will for probate and let the court pass upon its validity. We see no reason why also it was not incumbent upon him to try to sustain the will by such competent evidence as was obtainable, and this is all he did. That the testator was correctly adjudged mentally incapable of making a valid will is no fault of the executor. The judgment will therefore be modified by granting costs to the appellant in the county court, to be paid out of the estate.

The appellant has printed the case by question and answer instead of in a narrative form and has printed much of the record not necessary to any questions raised by the appeal, contrary to the practice in this court. No costs will be allowed him in this court for the printed case. Supreme Court Rule 44.

By the Court.—Judgment modified as indicated in the opinion, and as so modified is affirmed, with costs in this court, except for printed case, to both parties to be paid out of the estate.

WALTERS, Appellant, vs. EAKINS and another, Respondents.

October 21—November 16, 1920.

Appeal: Order setting aside stipulation.

Under sec. 3069, Stats., an order setting aside a stipulation is not appealable.

APPEAL from an order of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Dismissed.*

Replevin. This suit was begun to recover possession of a Fordson tractor. The defendants claimed to be holding the same as security for the amount of $102.17 repairs. The controversy between the parties was as to whether or not the plaintiff had properly oiled the tractor during the period of its operation. After the case had been brought to trial the parties entered into a stipulation by the terms of which a settlement was agreed upon, the liability of the respective parties to be determined by test as to how much oil it would require to fill the engine case to a point where the oil would drip from the lower pet-cock. The defendants claimed that it would require more than three quarts. The test was made and decided in favor of the claim of the plaintiff. Thereupon the defendants moved the court, upon a proper showing, to have the stipulation set aside. The court, after hearing, set aside the stipulation, and from the order setting aside the stipulation the plaintiff appeals.

For the appellant there was a brief by *Clinton G. Price* of Mauston, attorney, and *James H. Hill* of Baraboo, of counsel; and the cause was argued orally by *Mr. Price.*

For the respondents there was a brief by *McFarlane & Loomis* of Mauston, and oral argument by *J. A. McFarlane.*

ROSENBERRY, J. Although the question is not raised in briefs of counsel, we cannot take jurisdiction of this matter unless the order appealed from is in fact an appealable order. We find no provision of the statutes, sec. 3069,

authorizing an appeal from an order setting aside a stipulation. The order does not prevent a judgment from which an appeal may be taken, neither is it a final order. It does not grant or refuse a provisional remedy, nor does it vacate or refuse to set aside an order made at chambers, nor does it grant a new trial. Inasmuch as there must be a new trial, we refrain from any statement or discussion of the facts.

By the Court.—The appeal to this court is dismissed.

LOVELAND and another, Appellants, vs. HANSON, Respondent.

October 21—November 16, 1920.

Corporations: Notes signed by director: Authority: Fraud: Personal liability: Appeal: Fact not determined by special verdict: Presumption from judgment.

1. Under sec. 2858*m*, Stats., the court, in rendering judgment on a special verdict, will be deemed to have determined a fact omitted from the special verdict in conformity with the judgment.
2. To hold a director, who was also an employee, of a corporation personally liable on notes of the corporation which he has signed, there must be some element of deceit or fraud in that which he did, or an express or implied warranty on his part that he had authority to bind the corporation.
3. Where such director signed notes of the corporation because of representations of the payee's agent that other directors had assented thereto, the agent knowing that such director had no authority to execute the notes, he was not personally liable.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover on promissory notes. The plaintiffs are copartners engaged in the business of selling a copyrighted advertising campaign, with offices at Iowa City, Iowa. The Hanson Company is a corporation engaged in the general mercantile business at Rio, Wisconsin. *L. A. Hanson* was a

director of the company and a clerk in its store. He had power to make purchases of goods required to replenish the stock in trade, but further than that he had no power to bind the company or pledge its credit. The by-laws forbade officers or employees pledging the company's credit without the authority of the board of directors.

On the 3d day of August, 1916, a representative of the plaintiffs called at the store of the Hanson Company and solicited its order for their copyrighted advertising campaign. He talked with *L. A. Hanson,* who told him that he could not do anything without the consent of the rest of the directors; that he was willing if the rest of the directors were. He told the representative of the company who the rest of the directors were, and he (the salesman) spent the remainder of that day and a portion of the next interviewing the other directors. Sometime during the day of the 4th of August the representative returned to the store and told *L. A. Hanson* that he had interviewed the other directors and that they all consented to his signing notes for the advertising campaign. *Hanson* signed the notes, to recover the amount of which this action was brought. The next day he learned that the directors had not consented and that several of them were opposed to the venture. He wrote to the plaintiffs canceling the order.

The action was brought against the Hanson Company and *L. A. Hanson.* The jury returned a special verdict, by which it found (1) that the plaintiffs' agent, in order to induce *L. A. Hanson* to sign the notes and contract, represented to him in substance that the directors at Rio had all consented to his signing them; (2) that such representations were false; (3) that *L. A. Hanson* believed said representations; (4) that *L. A. Hanson* was induced by said representations to sign the notes and contract; (5) that *L. A. Hanson,* in signing the notes in question, did not intend to be personally liable thereon; and (6) that *L. A. Hanson* was not authorized to sign the notes and contract in question

for and in behalf of the Hanson Company. Upon this verdict the court rendered judgment in favor of both defendants. The plaintiffs appeal from that part of the judgment in favor of *L. A. Hanson.*

The cause was submitted for the appellants on the brief of *Rogers & Rogers* of Portage, and for the respondent on that of *Grady & Farnsworth* of Portage.

OWEN, J. The principal argument made by the appellants is that *L. A. Hanson* was not justified in relying upon representations made by the agent of the plaintiffs that the directors of the company had all consented to his signing the notes. An examination of the record convinces us that this was a jury question. True, the specific question of whether *L. A. Hanson* was justified in relying upon such representations was not submitted to the jury. But in submitting the fourth question to the jury the trial judge said:

"To be induced by a representation one must rely upon it, and a person is not justified in relying upon a false representation unless under all the circumstances it is of such a nature that a prudent man, in the transaction of his important business, is warranted in relying thereon. The false representations, to be considered as an inducement, must be of such a character and made under such circumstances that the person claimed to have been deceived was justified in relying upon them."

In view of this instruction the jury could not have answered the fourth question, "Was *L. A. Hanson* induced by such representations to sign the notes and contract," in the affirmative unless it was also found that he was justified in relying upon such representations. Furthermore, by virtue of the provisions of sec. 2858*m*, Stats., if such fact is essential to sustain the judgment it shall be deemed to have been determined by the court in conformity with its judgment. However, we do not deem this question very material. To hold *L. A. Hanson* personally liable upon the

notes there must be some element of deceit or fraud in that which he did, or an express or implied warranty on his part that he had authority to bind the Hanson Company. *Outagamie County Bank v. Tesch,* 171 Wis. 249, 177 N. W. 6, and cases there cited.

The record discloses no element of deceit or fraud on *Hanson's* part, and the agent of the company was fully advised concerning his authority or lack of authority in the premises. As said by the learned trial judge:

"That *L. A. Hanson* had no actual authority to sign the note, is clear. But the plaintiffs' agent knew as well as he did that he was without such authority. And the signature, as the jury found upon sufficient evidence, was induced by the false and fraudulent representation of the plaintiffs' agent that he, the agent, had procured from all the resident directors their assent to the making of the note. It is also clear that neither the plaintiffs nor *L. A. Hanson* contemplated that *L. A. Hanson* should be personally liable. Were the law to hold *L. A. Hanson* liable it would not only make a contract which the parties never contemplated, but would enable the plaintiffs to profit by the fraud of their agent. It would be a monstrous injustice, in view of the findings of the jury, for the law to do either."

By the Court.—Judgment affirmed.

WILL OF GRIFFITHS: WILLIAMS, Administratrix, and another, Appellants, vs. PARSONS, Respondent.

October 21—November 16, 1920.

Wills: Construction: Precedents and rules: Testamentary class: Specifying persons and absence of words of survivorship: Vesting of estate: Appeal by one legatee only: Jurisdiction of court: Death of legatee before testator.

1. In the absence of proof as to surrounding facts and extrinsic circumstances, in construing a will the court will ascertain the testator's intention from the language of the will alone and not by any supposed intent; and precedents and rules of

construction are less helpful in construing wills than in construing other writings which, owing to statutes or customs, are more uniform.

2. While the fact that testator specified in his will the names of beneficiaries may not raise a conclusive presumption that it was not his intention to create a testamentary class, it is a strong circumstance tending to such conclusion in the absence of language more clearly describing a class.
3. A will giving testator's wife a life estate in the residue of his estate and providing that on her death the property should be divided equally "between such of my brothers and sisters and the brothers and sisters of my wife as are hereinafter named," without words of survivorship, does not create a testamentary class to consist of such of the brothers and sisters of testator and his wife as were named in the will and alive at the time of the death of the wife, but vested a future estate in the named brothers and sisters at the time of the death of testator.
4. A mere direction by testator to divide after a life estate does not prevent a present grant or postpone the vesting beyond the death of the testator.
5. Inconvenience that may be caused by the construction given the will by the trial court will not be considered, since construction should not be affected by subsequent events; and in doubtful cases the law leans in favor of an absolute rather than a defeasible estate and favors an early vesting of estates.
6. In a proceeding to construe a husband's will, brought by the administratrix of the wife, who had been given a life estate in the residue of the husband's property, to ascertain to whom such residue should be given on the death of the wife, the fact that only one of the legatees joined the administratrix in an appeal from the judgment of the county court did not preclude the appellate court from reversing the judgment as to other legatees, since the administratrix represented such legatees and since the court did not lose jurisdiction to construe the will by failure of some of the interested parties to appeal.
7. In a proceeding to construe a will the court has jurisdiction not only to determine its meaning but to direct the administratrix *de bonis non* as to her duties in the distribution of the estate.
8. Under sec. 2289, Stats., on the death of a legatee during the lifetime of the testator the legatee's children were entitled to his share.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Modified and affirmed.*

Proceeding to construe a will.

Robert Griffiths executed his will on the 29th day of May, 1885. He died May 6, 1890, survived by his widow and, it appears, by an adopted daughter.

The will directed the payment of debts and funeral expenses out of personal property; the erection of a monument at his grave; bequeathed to a missionary society $100 to be paid within one year; bequeathed to the adopted daughter $500 to be paid to her when she arrived at twenty-one; and continued as follows:

"Fifth. The rest, residue, and remainder of my estate, both real and personal, I give, devise, and bequeath to my beloved wife, Esther Griffiths, during her natural life, and further it is my will that she shall not be limited to the income or use of my said estate, but that she shall be free to use and consume any portion or the whole thereof for her support, comfort, and enjoyment, if in her judgment she shall consider it expedient to do so, and I do this remembering that by her life-long devotion to the best interests of our home and by other means she has greatly aided in accumulating what property we now possess, and trusting fully the good judgment and discretion which she has ever exercised in all things.

"Sixth. I will and bequeath that such portion of my estate, either real or personal, as shall remain after the death of my said wife, Esther Griffiths, after paying her just debts and funeral expenses, shall be divided equally between such of my brothers and sisters and the brothers and sisters of my wife as are hereinafter named, share and share alike, to wit: my sister Ellen Williams, now residing at Hollyhead, Wales, and my three brothers, Richard Griffiths, now residing at Randolph, Wisconsin, William Griffiths, now residing in Liverpool, England, and David Griffiths, now residing at Hollyhead, Wales, the sisters of my wife, *Elisabeth Williams* of Columbus, Wisconsin, Mary Edwards of Brooklyn, New York, and Ellen Jones of the same residence as last named, and John R. Jones, a brother of my wife, of Mankato, Minnesota."

In conclusion the testator appointed his wife executrix.

Following the death of the testator the estate was probated so far as possible at that time.

The widow died in December, 1918, and an administratrix *de bonis non* with the will annexed was then appointed. It does not appear in the record whether the adopted daughter survived the widow.

It appears that of the eight residuary legatees named in the sixth clause of the will, one, Richard Griffiths, died before the testator. He left a widow and issue, one of whom is the respondent in this court. Only one of the eight, *Elisabeth Williams,* one of the appellants, now survives. The others died after the testator's but before his widow's death. The testator had two sisters not mentioned in the will who had died before its execution, leaving as next of kin the brothers and sisters mentioned in the will. The testator's wife had a brother and a sister living at the time the will was executed and not mentioned therein.

The administratrix *de bonis non* petitioned the county court for a construction of the will, setting forth the facts recited above. That court construed the will as working an equitable conversion of real estate into personal property, and construed the sixth clause as directing a division of the residue among such of the named legatees as survived the widow.

From that judgment the respondent herein appealed to the circuit court. The circuit court rendered judgment affirming the county court as to equitable conversion. The judgment in this respect is not questioned upon this appeal. The circuit court overruled the county court upon the other question and held that each of the named legatees took a vested legacy as at the time of the testator's death, and adjudged that the portion which would have been paid to each deceased beneficiary had he lived vested in him at the testator's death, that on such beneficiary's death it passed to his personal representatives, and that on the death of the testator's wife it should be paid to such representatives.

From this judgment the present appeal is taken by the administratrix and the survivor of the named legatees.

The cause was submitted for the appellants on the briefs of *Brossard & Zeidler* of Columbus, and for the respondent on those of *Grady & Farnsworth* of Portage.

JONES, J. It is claimed by the appellants that the will gave to the wife the entire estate for her support, comfort, and enjoyment, and that any portion remaining after her death was to be divided among those who constituted a testamentary class; that there was no present gift, the gift being merely implied from the direction to divide; that the members of the class were to be ascertained when the time came for division; and that only those then surviving could share.

It is claimed by respondent that the will did not create a testamentary class; that it contains words of present devise; and that the interest of each of the eight beneficiaries named vested at the testator's death, and upon the death of such beneficiary either before or after that of the testator passed to the personal representatives of the beneficiary, to be paid on the death of the testator's wife.

In this case we must seek to ascertain the intent of the testator from the language of the will alone, since no proof was given of surrounding facts or extrinsic circumstances. It would be a vain attempt to speculate as to what the testator would have caused to be written into his will if he could have foreseen the contingencies which have happened. If he could have foreseen the events to occur within the thirty-three years following the date of his will it probably would have been a very different document. Hence in interpreting the will we must be governed not by his supposed intent alone, but by that intent as in the will expressed.

The real meaning of the instrument is the sovereign guide, and, since every will differs in some respects from every other, it is a familiar principle that precedents and rules of construction are less helpful than in construing

other writings which, owing to statutes or custom, are far more uniform. Said Judge STORY in 1832 in discussing the construction of wills: "The cases almost overwhelm us at every step of our progress; and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor." *Sisson v. Seabury,* 1 Sumn. 235, 239. The difficulties have been by no means diminished by the innumerable volumes of the law reports which have since been added to our legal literature.

In their contention that the entire residue of the estate should go to the surviving sister of testator's wife, appellants' counsel rely largely on their claim that the will created a testamentary class consisting of such of the brothers and sisters of testator and his wife as are named in the will and who should be living on the death of his wife, and that it was the intent of the testator that the residue should be equally divided between the members of this class. The argument is that the estate could not vest until the death of the widow, because the persons constituting the class could not be ascertained until that time and the division could only be made among those then living.

There seem to us serious objections to such a construction of the will. In the document there appear two dominating purposes: first, that of giving ample protection to his wife who had aided him in accumulating his estate; second, that of giving the residue to the eight beneficiaries designated in the will by name.

It will be found that in most of the cases when the courts have construed wills to have created classes having some such effect as is claimed by counsel for the appellants, the bequests have been made to "heirs," "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," or to some other group of persons without specifically naming the beneficiaries. While the fact that the testator specified the names of the beneficiaries in this case may not raise a conclusive presumption that it was not his intention to

create a testamentary class, we regard it as a strong circumstance tending to that conclusion in the absence of language more clearly describing a class.

In this will there were no words of survivorship as between the eight beneficiaries. This seems to us a very significant fact bearing on its construction. In the very clear opinion of the trial judge, and in respondent's brief as well, it is stated in substance that no case in Wisconsin had been cited or found where the beneficiaries were specifically named and fixed in number, as in this case, where it was held that a class was created unless words of survivorship were used. In appellants' brief *Will of Waterbury,* 163 Wis. 510, 158 N. W. 340, is relied upon as supporting their contention. But in this case the court came to the conclusion, in the light of all the surrounding circumstances, that it was the intention of the testatrix to limit the amount to be received by those named in other clauses of the will to the amounts specifically bequeathed to them, and that, irrespective of whether or not the residuary legatees constituted a class, it was the intention to confine the distribution of the residue to them. Hence it would seem that this case was not based on the creation of a class. Counsel for appellants cite as bearing on this or other branches of the case *Albiston's Estate,* 117 Wis. 272, 94 N. W. 169; *Moran's Will,* 118 Wis. 177, 96 N. W. 367; *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073; *Benner v. Mauer,* 133 Wis. 325, 113 N. W. 663. But in all these cases the wills contained words of survivorship. It is our conclusion that no testamentary class was created by the will which postponed the final vesting of the rights of the beneficiaries.

It is argued by appellants' counsel that there are no words of present gift in the residuary clause and that it is simply a direction to divide the property remaining after the wife's death. They rely on *Cashman v. Ross,* 155 Wis. 558, 145 N. W. 199, in which it was held, there being no words of present gift, that where property under a will is to be divided

among a class only, those thereof who are alive at the time of the division can take under the will in the absence of other provisions to the contrary. Counsel also rely on the *Albiston Case, supra,* and the *Benner Case, supra;* but in these cases there were words of survivorship indicating uncertainty as to the persons who should take at a specified time. In the present case no class is created, no words of survivorship are used. The word "bequeath" is certainly in the present tense. Respondent's counsel claim that the meaning of the language is, I will and bequeath whatever shall remain after my wife's death to Ellen Williams, Richard Griffiths, William Griffiths, David Griffiths, *Elisabeth Williams,* Mary Edwards, Ellen Jones, and John R. Jones share and share alike.

Whether this is the correct interpretation or not, the claim for vesting on the testator's death seems strongly supported by several decisions of this court where there were no words of present devise and where there was direction for future division. It seems well settled that a mere direction to divide after a life estate does not prevent a present grant or postpone the vesting beyond the death of the testator. *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452; *Cowley's Will,* 120 Wis. 263, 97 N. W. 930, 98 N. W. 28; *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073; *West v. Andrews,* 166 Wis. 509, 166 N. W. 31; *Will of Reynolds,* 151 Wis. 375, 138 N. W. 1019.

In construing the will it seems to us of some importance that the event on which division should be made, namely, the death of testator's wife, was one sure to happen. It was not such an uncertain event as when one or more should reach majority or marry, so often mentioned in wills. The future event on which division is made is nothing personal or related to the legatees, but merely the ceasing of a life estate created by the will. There appears no reason for the postponement of the division except the certain protection of the wife during her life.

It is argued by appellants' counsel that the construction given the will by the trial court will cause much inconvenience, since there are many persons among whom the estate would have to be distributed. We do not consider that the construction to be placed upon the will should be affected by subsequent events.

We are disposed to construe the will as making a present gift, only postponing the time of enjoyment; and to hold that the element of futurity was annexed to the time of payment and not to the substance of the gift. In so holding we are supported by the rule of construction that in doubtful cases the law leans in favor of an absolute rather than a defeasible estate and favors an early vesting of estates. The rule is too familiar to require citation of authorities.

It is argued by appellants' counsel that since only one of the legatees took an appeal from the county court, only that party in any event could have the benefit of a reversal of the judgment. The proceeding for the construction of the will was brought by the administratrix *de bonis non* for the benefit of all the persons interested, and it was alleged in the petition that the proceeding was necessary in order to obtain a proper distribution of the estate. In this proceeding she represented all the legatees and their representatives. *Cowan v. Beans,* 155 Wis. 417, 144 N. W. 1129. If the will had been differently construed by the county court it would have been proper for her to take an appeal, if so advised by competent counsel. When another party appealed to the circuit court, the administratrix still represented not only her own interests but the interests of all persons concerned. When she appealed to this court she acted in the same capacity. If the judgment of the circuit court were reversed the entire estate would go to *Elisabeth Williams,* another party to the action, an appellant and the only surviving legatee.

In the proceeding to construe the will the court obtained jurisdiction not only to determine its meaning but to direct

the administratrix *de bonis non* as to her duties in the distribution of the estate. We do not consider that this jurisdiction has been lost by the fact that some of the many parties interested did not appeal from the judgment of the county court.

It follows that the judgment of the circuit court is affirmed except in one particular. It appears from the record that Richard, one of the legatees, predeceased the testator and left two children surviving him. Under the terms of the statute, sec. 2289, the share of Richard should go to his issue.

By the Court.—Judgment modified as indicated in the opinion, and as so modified is affirmed, with costs in this court to both parties to be paid by the estate.

SLITER and another, Respondents, vs. CREEK VIEW CHEESE FACTORY, Appellant.

October 22—November 16, 1920.

Sales: Contract to install machinery: Delay in delivery and installation: Rescission by purchaser after notice: Acceptance of part of machinery.

1. Where defendant bought a plant consisting of a separator and other equipment which was to be installed in its cheese factory as a unit, the fact that defendant hauled the separator to its factory and received and retained other machinery for a considerable time did not amount to an acceptance, as, under sub. 2, sec. 1684*t*—19, Stats., title did not pass until the stipulated installation was completed.
2. Installation of the plant having been unreasonably delayed through no fault of defendant, it was entitled to rescind by giving reasonable notice of its intention so to do in case installation was not made by a specified time.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Action to recover $525, the purchase price of one num-

ber 40 Sharples steam turbine whey separator, one 4,000-pound supply tank, one American jet and the necessary pipe and fittings therefor installed in defendant's cheese factory. The contract on behalf of plaintiff's assignor, the Sharples Separator Company, was negotiated by one of its traveling salesmen, D. E. Owen, who obtained from defendant the following order:

Sales. 7/6/18.

The Sharples Separator Co.
West Chester, Pa.

Ship to *Creek View Cheese Factory.*
At Boyd, Wis. R. No. 2.
How ship: Frt. Soo. When: Now.

Quantity.	*Article.*	*Price.*
1 (one)	No. 40 whey sep. steam turbine	$475
1 (one)	4,000-lb. galvanized supply tank	40
1 (one)	American jet—necessary pipe and	5
	jettings	5
		$525

(Terms). To be paid with cream checks.

All orders are subject to the terms and conditions of the regular printed contract. All other agreements must be written on this order, which is subject to the approval of the Sharples Separator Company.

CREEK VIEW CHEESE FACTORY.
(Agent.)

Nels Knudtson, Secy. Wm. Hubbard, Pres. D. E. Owen, Traveler.

This includes complete installation.

The answer, among other defenses, alleged that plaintiffs were not the real parties in interest, but the Sharples Separator Company was, and that if they were they had failed to perform, inasmuch as they had failed to install or tender installation of the plant within a reasonable time. Plaintiffs sought to show on the trial that the delay in installation was due to defendant's failure to have its plant in suitable condition for installation. The jury found (1) that defendant did not between September 27 and October 30, 1918, fail to

place its plant and equipment in suitable condition to enable the plaintiffs to install the machinery in question; (2) that plaintiffs, under existing circumstances, failed and neglected for an unreasonable length of time to install the machinery after September 27, 1918. They also found the reasonable cost of installation on October 30, 1918, and the difference in value of a payment in cream checks, as the order provided, and a cash payment, which findings are not material to any question raised by the appeal.

The court denied plaintiffs' motion to amend the verdict by changing the answer to the first question from "No" to "Yes" and the answer to the second question from "Yes" to "No," but granted their motion for judgment on the verdict as returned by the jury. From a judgment entered for the purchase price, less the cost of installation and the difference in value between a cash payment and payment in cream checks, defendant appealed.

The cause was submitted for the appellant on the brief of *E. M. Bradford* of Augusta and *Linderman & Ramsdell* of Eau Claire, and for the respondents on that of *Anson Green* of Stanley and *L. M. Sturdevant* of Eau Claire.

VINJE, J. The evidence is quite satisfactory that defendant had consented to the substitution of plaintiffs in place of the Sharples Separator Company as the owner of the contract and the parties who were to install the machinery. Its defense in that respect is therefore not well taken. On the other issues litigated the verdict is well sustained by the evidence. It appears that it was not till October 30, 1918, that plaintiffs offered to install. On the 17th of that month, after repeated failures by plaintiffs to install as promised, defendant wrote them that if they did not install by the 21st the order would be canceled. On the 23d of that month defendant purchased a separator from another party and refused to permit plaintiffs to install on the 30th when they finally had all the fittings neces-

sary for installation. It is undisputed that defendant caused the separator to be hauled from Boyd to its factory some time after August 28, 1918, and the tank and some piping were hauled there sometime after September 8th. Since the defendant received part of the machinery, the trial court evidently reached the conclusion that such receipt constituted an acceptance of the machinery and that title thereto passed to the defendant and it became liable for the purchase price. In so holding we think the court erred. The defendant bought an installed plant to be operated as a unit in its cheese factory. It required skilled labor to install it, and such labor was included in the purchase price of $525. In such case the purchaser of an installed plant does not accept the contract as fulfilled even *pro tanto* by receiving and retaining parts of machinery that are to go into the completed plant. It is received by the purchaser and held for installation by the seller, and the contract is not performed till installation is complete, as stipulated in the order, or until complete installation is waived. Nor does such receipt of parts of a plant operate to transfer title thereto in the vendee in the absence of express agreements that it shall do so. Plaintiffs seek to invoke the rule that, in the sale of specific goods in a deliverable state, property in the goods passes to the vendee when the contract is made, unless it is clear title is intended to be transferred at another time. This case does not fall within that rule because defendant did not buy specific goods in a deliverable state, but a plant that was to be constructed out of certain specified articles and also out of other articles, such as piping, that was not specified so as to be capable of identification. Pipe of any reputable make of the required size would answer the terms of the contract. Defendant never waived or accepted what it bought, namely, a completely installed plant consisting of the specified articles and such others as complete installation required. But even if the articles bought are regarded as specific goods, something was required to

be done to them by the seller before the contract of sale was performed. They were to be installed. In such case property does not pass till the stipulated thing is done. Sub. 2, sec. 1684*t*—19, Stats.; *J. B. Bradford P. Co. v. Hacker,* 162 Wis. 335, 156 N. W. 140.

Since it is found that plaintiffs unreasonably delayed installation through no fault of defendant, it had a right to rescind the contract as it did by giving reasonable notice of its intention to rescind in case installation was not made by the specified time. *Davis v. Hubbard,* 41 Wis. 408; *School Dist. v. Hayne,* 46 Wis. 511, 1 N. W. 170; *Jung B. Co. v. Konrad,* 137 Wis. 107, 118 N. W. 548.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

GRAF, Respondent, vs. NEWMAN and others, Appellants.

October 22—November 16, 1920.

Husband and wife: Conveyance of husband's land by wife: Estoppel: Adverse possession by wife after husband's death: Betterments: Improvements made before adverse holding.

1. Where land conveyed to a wife had previously been conveyed in part to the husband and was thereafter used as a whole, being dealt with by the wife as the agent of her husband, due to his insanity and failing health, and was at no time in the exclusive adverse possession of the wife, neither the husband, whose acts in relation to the land were in no way inconsistent with his claim of ownership, nor his heir was estopped from claiming the land previously conveyed to the husband as against successors in interest of persons to whom it was conveyed by the wife.
2. Such possession by the wife of the husband's land subsequent to his death was not adverse to his heir, since the wife had a homestead interest in the land prior to her second marriage and a dower interest thereafter.
3. Where improvements were not made by one holding adversely to the owner under secs. 3096–3100, Stats., the court properly denied recovery therefor in an action to quiet title and cancel the deed.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action to quiet title and cancel deed. Peter Graf, the father of the plaintiff and the husband of Frances Graf, in his lifetime secured a conveyance of the premises in question from one Louisa J. Bartels, October 15, 1894. On the 15th day of June, 1901, Louisa J. Bartels made a conveyance to Frances Graf, the wife, of a tract of land which included that described in the conveyance to Peter Graf and other land. In June, 1901, Frances Graf leased the entire property to one Alex Lozo, and Peter Graf and his family removed from the premises. Lozo remained in possession until the expiration of his lease, when Peter Graf and his family again took possession. May 17, 1905, Frances Graf conveyed the premises to Frank Erdlitz. On August 26, 1905, Erdlitz deeded the premises to Frances Graf. Frances Graf went into possession and remained in possession about two months, when she rented the premises to one William Kollencheck. On October 22, 1907, Frances Graf conveyed the lands to Dr. G. Newman & Company for $3,000, she being the person described as "and company," it being a deed, therefore, to *G. Newman* and herself, and by mesne conveyances the title was passed to the defendant *John McBeth.* Peter Graf was committed to the insane asylum on October 17, 1905, and died without having recovered his sanity December 21, 1905. The plaintiff, *Mary Graf,* was twenty-one years of age on the 13th day of October, 1917. Subsequent to the conveyance by Frances Graf to *Gustav Newman,* October 22, 1907, the plaintiff, then a minor, was, on February 1, 1917, induced by *Newman* to execute to him a quitclaim deed, which was without consideration. On January 8, 1912, Frances Graf and *G. Newman* executed a deed to said premises to *G. Newman,* who went into possession, claiming the premises against any and all rights of *Mary Graf,* the plaintiff. The court found the facts as stated, and other facts not material on this appeal,

concluded that the deed given by *Mary Graf* to *G. Newman* February 1, 1917, was void and inoperative, that *Mary Graf,* the plaintiff, is the owner in fee of said premises, subject to the assigned dower right of Frances Graf, and that the defendants and each of them be forever barred from having or claiming any right in and to the premises described. The plaintiff had judgment accordingly, from which the defendants appeal.

Charles A. Enslow of Janesville, for the appellants.

For the respondent there was a brief by *L. M. Nelson,* attorney, and *P. A. Martineau,* of counsel, both of Marinette; and the cause was argued orally by *Mr. Martineau.*

ROSENBERRY, J. It is the claim of the defendants that Peter Graf would, if alive, be estopped to deny the title of Frances Graf; second, that the defendant *McBeth* and his grantors were for ten years or more preceding the date of the commencement of the action in continuous, open, notorious, exclusive possession and occupancy of the premises under a claim of title founded upon a sufficient written instrument, holding adversely against the whole world.

The facts out of which the estoppel of Peter Graf, and consequently of his heir, *Mary Graf,* is claimed to arise are these: First, that Peter Graf acquiesced in the conveyance of that part of the premises owned by him by Louisa J. Bartels to Frances Graf; second, that he acquiesced in the execution of a lease of the property to Lozo June 28, 1901; third, acquiesced in the execution of a lease to William Kollencheck by Frances Graf; fourth, that he at one time stated to a witness that he wanted to have his property in his wife's name; and fifth, by refraining from in any manner exercising any authority over the property. The court found, upon ample evidence, that the wife dealt with the property as the agent of her husband, due to his insanity and failing health, and that Frances Graf did not possess said premises adversely to either the plaintiff or her father, Peter Graf.

We think this finding of the trial court is amply sustained. There was nothing in the conduct of Peter Graf inconsistent with his claim to ownership. The premises, after the deed by Louisa J. Bartels to Frances Graf, were used as a whole, and they were at no time in the exclusive adverse possession of Frances Graf. Therefore the trial court was correct in holding that neither Peter Graf nor his heir, the plaintiff, was estopped, and that until the deed by Frances Graf and *G. Newman* to *G. Newman* January 8, 1912, there was no holding of the premises adverse to the rights of the plaintiff herein, but that the possession of Frances Graf and the lessees under her and those to whom she conveyed the premises was subordinate to the rights of the plaintiff. Frances Graf had at all times up to the time of her marriage a homestead interest in the premises, and had thereafter a dower interest. Her possession of the premises was not in any sense adverse to the title of *Mary Graf,* the plaintiff.

It is further contended on the part of the defendant *McBeth* that the court erred in denying recovery for improvements placed upon the premises. There having been, as to plaintiff, no adverse possession prior to January 8, 1912, the improvements having been made before that time, the improvements were not made by one holding adversely under the provisions of secs. 3096–3100, Stats. The trial court therefore correctly held the defendant *McBeth* was not entitled to recovery therefor.

By the Court.—Judgment affirmed.

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19. Under sec. 3071, Stats., authorizing the supreme court, upon appeal from a judgment or order or upon a writ of error, to reverse, affirm, or modify the judgment or order, the court will not dismiss a frivolous appeal from an order overruling a demurrer to the complaint, but will summarily affirm the order on motion, without waiting to reach the case in ordinary procedure. *Ibid.*

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See WORKMEN'S COMPENSATION, 11.

Duties: Powers: Appearance on behalf of state.

1. The attorney general of Wisconsin has no common-law powers or duties; his duties spring from statute, and he must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity. *State v. Snyder,* 415
2. Under sec. 14.53, Stats., the attorney general has no power to prosecute any action in the circuit court, except in cases remanded by the supreme court, unless requested by the governor or either branch of the legislature, or in cases specifically authorized by statute, as in sec. 3236. *Ibid.*
3. Though a provision of the workmen's compensation act requiring the attorney general to defend the awards of the industrial commission contravenes other general provisions found elsewhere in the statute, by familiar rules of statutory construction the special provision, dealing with a particular subject, prevails over the other general provisions. *Ibid.*
4. The statutory duty of the attorney general being to defend the awards of the industrial commission, the governor cannot impose upon him duties in conflict therewith. [*Quære,* whether the spirit of the workmen's compensation act does not suggest acquiescence on the part of the state in decisions of the industrial commission upon questions affecting the duty of the state towards its injured employees.] *Ibid.*

ATTRACTIVE NUISANCES. See HIGHWAYS, 6.

AUTOMOBILES.

See APPEAL, 16, 17. EVIDENCE, 3, 5. NEGLIGENCE. PENALTIES. PRINCIPAL AND AGENT. STREET RAILWAYS, 9–15.

Injuries to pedestrians: Negligent operation: Passing standing street car: Contributory negligence.

1. In an action by plaintiff, who was struck by defendant's automobile truck as he passed in front of a street car from which he had alighted, an instruction that the operator of an automobile has the right to assume that every person whom he meets will exercise ordinary care and caution, under the circumstances, to avoid injury, and will not expose himself to danger, "but will, as is his duty, exercise ordinary care

to keep a careful lookout," is not objectionable as imposing on plaintiff an absolute duty to keep a careful lookout. *Becker v. West Side Dye Works,* 1

2. The failure of the driver of a motor vehicle to observe the law of the road in passing a street car does not absolve a pedestrian passing such car from the duty to exercise ordinary care for his own safety; and the evidence in this case is *held* to warrant a finding that he was guilty of negligence precluding recovery. *Ibid.*

Same: Pedestrian crossing street: Failure to sound horn.

3. In an action by a pedestrian for personal injuries received when struck by an automobile while he was attempting to cross a public street, a finding that defendant drove the automobile at an excessive rate of speed is *held* not to be supported by the evidence, though plaintiff, a boy, testified that it was going twenty-five or thirty miles an hour, where it ran only three or four feet after striking him and he did not see it until it was but two to seven feet from him. *Feyrer v. Durbrow,* 71

4. Negligence of the driver could not be predicated on an excessive rate of speed, where the speed was not in excess of twelve or fifteen miles an hour. *Ibid.*

5. The driver of an automobile is under no obligation to sound his horn as he approaches a street intersection. *Ibid.*

6. The failure of the driver to sound his horn when approaching a street intersection could not have been the proximate cause of plaintiff's injury, where each discovered the other's approach at the same time. *Ibid.*

7. A finding that defendant was negligent in not sooner discovering the presence of plaintiff in the street cannot be sustained where the plaintiff was in equally as good a position to discover the automobile as defendant was to discover him, and each discovered the other at the same time. *Ibid.*

Same: Collision with automobile: Law of the road.

8. The skidding of an automobile does not necessarily imply negligence, so that the doctrine of *res ipsa loquitur* is not usually applicable to a collision resulting therefrom. *Linden v. Miller,* 20

9. The violation of secs. 1636—49 and 1636—49*b*, Stats., by turning an automobile to the left instead of to the right on approaching another automobile, is in itself negligence. *John v. Pierce,* 44

10. Where it is shown that the driver of the automobile in which plaintiff was riding turned to the left instead of to the right upon meeting defendant's automobile, a charge in general terms that the latter had a right to assume that every person whom he meets will exercise ordinary care to avoid injury is insufficient; and a requested instruction that he had a right to expect that a turn to the right would be made, until such time as an ordinarily prudent person would know otherwise, should have been given. *Ibid.*

11. The driver of an automobile on a highway has the right to assume that an automobile coming in the opposite direction will keep to the right. *Ibid.*

12. Whether deceased was guilty of contributory negligence in driving a truck, during a period of heavy traffic, to the left of a monument in the center of intersecting streets, whereas vehicles going in the same direction as deceased ordinarily went to the right of the monument, is for the jury; and a finding that he was guilty of negligence contributing to his injury is sustained. *Shortle v. Sheill,* 53

13. In an action for damages to an automobile in a collision with another automobile at a street intersection, the evidence is *held* to sustain a finding that plaintiff was not negligent. *Paul v. Pfefferkorn,* 61

14. A finding by the jury that the defendant sustained no damages, when it was undisputed that he sustained damages in the sum of $58.40, does not show that the verdict for plaintiff was perverse and should be set aside, the jury evidently understanding that defendant's negligence precluded recovery and the other findings being in accord with the evidence. *Miner v. Rolling,* 167 Wis. 213, followed. *Ibid.*

Same: Contributory negligence of driver imputed to guest.

15. Contributory negligence on the part of the driver of an automobile in which plaintiff was riding would defeat his right to recover for damages received in a collision with another automobile, also negligently driven. *John v. Pierce,* 44

AVULSION. See NAVIGABLE WATERS, 7.

AWARD of industrial commission. See WORKMEN'S COMPENSATION.

BAILMENT.

Leased machinery: Reservation of title: Conditional sale.

1. A contract between a shoe-repairing machine company and a customer which expressly reserves title to certain machinery in the company, is construed to create a bailment only and to be a lease or license of the machinery and not a conditional sale. *United S. R. M. Co. v. Asoumanakis,* 102

2. The lessee or licensee of the machinery, having no title himself, could pass none by direct sale, and none could pass by virtue of a sale under an execution against him. *Ibid.*

BALLOTS. See ELECTIONS.

BANKS AND BANKING.

Liquidation of trust company: Limitation of actions: Claims.

1. The commencement of liquidation proceedings against a trust company by the commissioner of banking under sec. 2022, Stats., suspends, so far as the commissioner is concerned, the running of the statute of limitations (sub. (5), sec. 4222) as to any then existing obligation of the trust company, so that any subsequent interval between the commencement of the

liquidation proceedings and the presentation of a claim for relief by any creditor should not be counted as any part of the statutory period of six years. *Wisconsin Trust Co. v. Cousins,* 486

2. Notwithstanding sub. (5), sec. 4222, Stats., provides for no exceptions in any situation and it has been applied although apparent hardship has resulted, it has been held on the ground of public policy not to apply to transactions between husband and wife (*Flanagan's Estate v. Flanagan's Estate,* 169 Wis. 537); and in this case, where the state at its own instance, through a public official (the commissioner of banking), assumes complete jurisdiction in liquidation proceedings over the property of a debtor, it is *held* that the commissioner of banking is placed in such a trust relationship to the property of the insolvent and its creditors that the statute of limitations then running as against the debtor must be stayed. *Ibid.*

3. It is necessary that the transaction, relied upon by a claimant against the assets of an insolvent trust company, shall be first set forth by the claimant in a claim presented to and filed with the commissioner of banking before any other proceedings can be instituted by such claimant creditor as against such commissioner, the assets in his hands, or securities pledged with the state treasurer by the trust company. *Ibid.*

Same: Enlargement of time to present claims.

4. On a proper showing of good excuse for claimant's failure to file a claim within the time originally fixed by the commissioner of banking, engaged in the liquidation of an insolvent trust company, the circuit court may permit the claimant to file his claim against the assets of the trust company after the expiration of said time. *Wisconsin Trust Co. v. Cousins,* 486

5. Where the claimant is permitted by the court to file his claim after the expiration of the time originally fixed, he can share in the distribution of assets by means of dividends only to the extent of assets in the hands of the commissioner at the time of the filing of his claim and then applicable for distribution and cannot share in prior dividends. *Ibid.*

Same: Negligence: Improvident investments.

6. Where investments in a particular loan made by a trust company as agent were improvident and improper, a cause of action arose for its negligence. *Wisconsin Trust Co. v. Cousins,* 486

7. Where a client of the trust company died before the cause of action arising from an improvident loan was barred by the statute of limitations, and before the expiration of the year limited by sec. 4234, Stats., for his executor to sue on such cause of action the trust company itself became executor, it breached its duty in qualifying as executor and thereafter failing to take any proceedings to enforce or collect the claim for its own negligent investment before the same should be

barred, and for such breach of duty a new and independent cause of action arose against the trust company in favor of the client. *Ibid.*

8. Investments made in a particular loan by the trust company and continued by it as parts of either of two renewal loans of date ten years later, are in effect but parts of one continuous transaction. The statute of limitations therefore begins to run from the time of the original and improper investment. *Ibid.*

9. Where the original claim filed with the commissioner of banking referred to the negligent investment by the trust company originally and not to new or independent causes of action arising because of breach of duty by the trust company as executor, there was no foundation for the allowance by the trial court of any claim based on the latter theory. *Ibid.*

10. Where a claim filed with the commissioner of banking, engaged in liquidating a trust company, did not mention two transactions relative to improvident investments by the company, and they were not specified until the filing of a complaint, such items could not properly be considered or allowed by the court. *Wisconsin Trust Co. v. Cousins, ante,* p. 486, followed. *Sharpe v. Cousins,* 509

11. Where a claim presented to the commissioner of banking, engaged in liquidating an insolvent trust company, specifically referred to improvident investments by the trust company and not to conversion by the trust company of moneys subsequently received on account of such investments, which was a new and independent cause of action, an amendment to the complaint filed after rejection of the claim by the commissioner should not have been allowed. *Wisconsin Trust Co. v. Cousins, ante,* p. 486, followed. *Gilbert v. Cousins,* 513

BENEFICIAL ORDER. See INSURANCE, 3.

BEQUESTS. See WILLS.

BILL. See STATUTES, 1.

BILL OF EXCEPTIONS. See APPEAL, 9.

BILLS AND NOTES.

See CORPORATIONS, 13, 14. SALES, 4.

"Negotiable paper:" Stock certificates.

1. Stock certificates are not "negotiable paper" within the meaning of sec. 1675—51, Stats., as such statute existed on July 10, 1913, providing that the indorsement or delivery of "negotiable paper" as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value. *Merrill v. Focht,* 575

Renewal of obligation by new note.

2. A renewal of an obligation by the giving of a new note or the extension of time in which to pay a pre-existing debt is but a mere carrying on of the prior obligation, unless it appears

that the parties agreed it should be a destruction of the old and the creation of a new obligation. The giving of additional security at the time of renewal or extension of time of payment of the pre-existing debt by the giving of a note of a third person, or otherwise, does not alter the creditor's right to continue to reap all the benefits of the pre-existing obligation and does not relieve the debtor from the original obligation. *Wisconsin Trust Co. v. Cousins,* 486

Notes signed by corporate officers. See CORPORATIONS, 14.

BOARD OF REVIEW. See TAXATION, 4, 5, 21.

BONA FIDE PURCHASERS. See FRAUD, 2.

BONDS. See MUNICIPAL CORPORATIONS, 4, 5, 7, 8.

BOUNDARIES. See APPEAL, 20. REPLEVIN, 2.

BREACH.
Of contract. See CONTRACTS, 8–10.
Of warranty. See SALES, 11, 12, 14.

BREACH OF MARRIAGE PROMISE.

Seduction after marriage promise: Evidence: Instructions.

1. In an action for breach of marriage promise, where plaintiff's testimony was somewhat confused and perhaps conflicting yet emphatic on the subject, the jury was justified in believing her testimony that her seduction took place after a mutual agreement to marry. *Klitzke v. Davis,* 425
2. Failure to instruct that if a marriage promise was in consideration of illicit intercourse it was void was not reversible error where no such defense was pleaded nor such an instruction requested, and where, even if it had been given, it is probable from the evidence that the jury would have found that the seduction took place after the promise of marriage. *Ibid.*

Elements of damages: Aggravated damages: Punitive damages.

3. Since the breach of marriage promise involved plaintiff's seduction, the jury had the right to consider the usual elements of damages in actions of this character, including plaintiff's disappointment in her reasonable expectations of pecuniary advantage from the marriage, the injury to her feelings, and the mortification and mental suffering which followed the breaking of a long engagement, and her dissuasion from association with other men for such period, rendering the possibility of another marriage more remote. *Klitzke v. Davis,* 425
4. An instruction that, if there was sexual intercourse while there was no promise to marry, the plaintiff would not be entitled to recover therefor, but that if the defendant, by reason of the promise of marriage, was enabled to and did seduce the plaintiff, this seduction might be taken into account in aggravation of damages, was proper. *Ibid.*
5. Where plaintiff was seduced by defendant, who without just cause broke his promise of marriage, impairing her social standing and darkening her life, although there was no proof

of property owned by defendant, since the amount of damages in such cases is peculiarly within the jury's province a verdict of $5,000 compensatory and $1,500 punitive damages, not reduced by the trial court, is not so large as to indicate passion or prejudice. *Ibid.*

BROKERS.

See FRAUDS, STATUTE OF, 4. PARTNERSHIP, 1.

Sufficiency of written contract: Statutory requirements.

1. A writing signed by the defendant landowner and plaintiffs, real-estate brokers, gave the brokers the exclusive right to sell defendant's farm and contained this clause: "the first party [owner] reserves the right to revoke this agreement by giving three months' notice in writing." *Held,* that the time of duration of the contract is sufficiently definite to comply with sec. 2305*m,* Stats., which requires that the writing express the period of the broker's agency. This statute is to be regarded as an extension of the statute of frauds and governed by the principles applicable thereto. *Brown v. Marty,* 411
2. The words "Sep. 20—1919 exclusive sail" do not conform to the requirement of sec. 2305*m,* Stats., that the writing express "the period during which the agent or broker shall procure a buyer," as the parties may have intended that the broker have an exclusive right of sale to September 20th and that the agency would continue indefinitely thereafter. *Gifford v. Straub,* 396
3. Defendant's written contract to give the broker all he got for his place over $11,500 stated the amount of the commission to be paid so as to comply with sec. 2305*m,* Stats. *Ibid.*
4. Under such contract the broker would have performed his part of the contract if he produced within the time limit a purchaser ready and willing to pay the price; he was not required to get the money and actually pay it over. *Ibid.*

Same: Description of land: Sufficiency.

5. Since a brokerage contract described the lands as the property owned by the defendant in sections 35 and 36 in a designated town, the allegation of the complaint that the plaintiffs sold the lands described in the writing by land contract, a copy of which was annexed to the complaint, is sufficient to admit evidence that defendant owned the land described in the land contract and no other to which the description in the commission contract was applicable. *Brown v. Marty,* 411
6. In an action by a real-estate broker to recover a commission for the sale of defendant's farm, a written contract which described the premises as "my place" is sufficient, under sec. 2305*m,* Stats., there being no demurrer to the complaint and the evidence showing that defendant owned but one tract of land, the farm on which he lived, and that this was the land shown to the proposed purchaser and the only land the parties had in mind. *Gifford v. Straub,* 396

7. The writing relied on to establish such a contract need not describe the land subject to sale otherwise than by a reference therein to some extrinsic fact by means of which the land can be known with sufficient certainty. *Ibid.*

Sharing profits between brokers.

8. Where real-estate agents gave their note for the purchase price of land and agreed to share the profits arising from its resale, the failure of some of the agents to meet their share of the note before it was due, as requested by the others, does not deprive them of their share of the profits where the land was resold before the note became due, there being no actual default. *Etscheid v. Tiefenthaler,* 273

BURDEN OF PROOF. See CORPORATIONS, 8. NOVATION, 1. PARTIES, 1. PHYSICIANS, 8. TRIAL, 3.

CANCELLATION.
Of contract. See CONTRACTS, 6.
Of deed. See FRAUD, 2.
Of stock certificate. See CORPORATIONS, 5.
Of will. See WILLS, 8.

CARRIERS. See NEGLIGENCE, 3.

CAUSE OF ACTION. See ACTION.

CERTIFICATE on appeal. See APPEAL, 9.

CERTIORARI.

See SCHOOLS, 2. TAXATION, 5, 6.

Judgment: Form: Reversal of void order.

1. The judgment on *certiorari* must be one either of affirmance or reversal in whole or in part. *State ex rel. McDiarmid v. Knight,* 138
2. Though an order of a committee on common schools purporting to create a consolidated rural school district is void for want of jurisdiction and therefore harmless, it may be reversed on *certiorari.* *Ibid.*

CHARTER. See WILLS, 18.

CHILDREN. See HIGHWAYS, 6. NEGLIGENCE, 1. WILLS, 16.

CIRCUIT COURT. See COURTS, 2.

CIRCUMSTANTIAL EVIDENCE. See FALSE PRETENSES, 2.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIM.
Against decedent. See DESCENT, 2. EXECUTORS.
Against insolvent trust company. See BANKS.
For exemption. See TAXATION, 16.

CLASS LEGISLATION. See CONSTITUTIONAL LAW, 2, 3.

COLLATERAL SECURITY. See BILLS AND NOTES, 1. LANDLORD AND TENANT, 1.

COMMERCIAL PAPER. See BILLS AND NOTES.

COMMISSIONER OF BANKING. See BANKS.

COMMISSIONS. See BROKERS, 3, 4. JOINT ADVENTURERS. PARTNERSHIP, 1. PLEADING. PRINCIPAL AND AGENT.

COMMITMENT. See PENALTIES, 5.

COMPANIES. See JOINT ADVENTURERS.

COMPETENCY of witnesses. See WITNESSES.

COMPLAINT. See ACTION. BROKERS, 5. CORPORATIONS, 9.

CONDITIONAL DEEDS. See DEEDS.

CONDITIONAL SALES. See BAILMENT. SALES.

CONFIDENTIAL COMMUNICATIONS. See WITNESSES, 1.

CONFUSION OF GOODS. See REPLEVIN, 2.

CONSIDERATION. See ASSIGNMENTS. BILLS AND NOTES, 1, 2. DEEDS. FRAUD, 1. FRAUDS, STATUTE OF, 1. PATENTS, 4. REFORMATION.

CONSOLIDATED RURAL SCHOOL DISTRICT. See CERTIORARI, 2. SCHOOLS.

CONSPIRACY. See FALSE PRETENSES.

CONSTITUTIONAL LAW.

See TAXATION, 16.

Due process: Vested rights.

1. Although defendant has the legal right, under sec. 3069, Stats., to appeal from an order sustaining a demurrer, he has no vested right in the rules of procedure regulating the manner and time of hearing appeals in the supreme court. *Strange v. Harwood,* 24

Same: Right to speedy trial. See APPEAL, 18, 19.

Uniform county government: Nonpartisan elections. See COUNTIES. ELECTIONS.

2. A general law applicable to a class of counties which constitutes a departure from uniformity in county government must rest on facts and existing conditions showing it is not practicable to carry on the county government in the particular class under the law providing for the carrying on of county governments generally throughout the state. *State ex rel. Melms v. Young,* 197

3. Ch. 566, Laws 1919 (sec. 5.265, Stats. 1919), providing for the nonpartisan nomination and election of county officers in counties having a population of more than 250,000, is an unjustifiable departure from the uniform system of county government established by the legislature of the state, and violates sec. 23, art. IV, Const. *Ibid.*

Delegation of legislative power. See PUBLIC UTILITIES, 2.

Limitation of indebtedness. See MUNICIPAL CORPORATIONS, 7.

CONSTRUCTION OF WILL. See WILLS, 9–19, 21.

CONTEMPT OF COURT. See INJUNCTION.

CONTINUANCE.

Absence of material witness.

Where the affidavit supporting a motion for the continuance of the trial of an accused alleged that a material witness was with the American Expeditionary Forces in France, that he would testify to certain facts which it developed upon the trial were immaterial to the issue, and would also testify that defendant was not practicing medicine—which would be incompetent,—without showing any ground for a belief that the witness could be present at the next term of court, it was not an abuse of the court's discretion to deny the continuance. *Till v. State,* 266

CONTRACTS.

See BAILMENT. BANKS, 8. FRAUDS, STATUTE OF. NOVATION. PARTNERSHIP. REFORMATION. REPLEVIN, 3.

Formation. See EVIDENCE, 6.

Parties: Unauthorized agent as contracting party.

1. Where a husband, without authority from his wife, contracts to sell realty belonging to her, he himself is bound by the contract. *Russell v. Ives,* 123

Consideration. See ASSIGNMENTS. BILLS AND NOTES, 1, 2. DEEDS. FRAUD, 1. FRAUDS, STATUTE OF, 1. PATENTS, 4. REFORMATION.

Validity: Allowing seller to fix price. See FRAUDS, STATUTE OF. MUNICIPAL CORPORATIONS, 3, 6. PATENTS, 2.

2. An agreement to take and handle such goods as plaintiff might order from defendant and pay therefor at prices fixed by defendant which did not require plaintiff to order any goods from the defendant, was not contrary to public policy. *Cochrane v. Jacob E. Decker & Sons,* 38

Construction. See BAILMENT, 1. BROKERS. CORPORATIONS, 12. EVIDENCE, 6. LANDLORD AND TENANT, 1, 2. MECHANICS' LIENS, 1. PARTNERSHIP, 1, 2. PATENTS, 3, 4. SALES. VENDOR AND PURCHASER, 1.

Same: Parol evidence: Practical construction.

3. In an action on a written contract of employment, testimony as to a conversation by plaintiff with a third person concerning the terms of his employment, some time before the execution of the contract, the third person taking no part in the negotiations, was inadmissible to explain any ambiguity in the contract. *Strayer v. Gimbel Bros.* 76

4. A long course of dealing wherein the employer submitted and the employee accepted monthly statements showing the compensation to be paid, was binding on the employee as a correct interpretation by the parties of the ambiguous contract of employment. *Ibid.*

Termination: Evidence.

5. Where it was conceded at the trial that defendant had the right to terminate a contract, but the jury found that he had not terminated it at the only time he claimed he did, it was not error for the court to refuse to submit a question requested by the defendant as to whether he had the right to terminate the contract. *Berryman v. Larmer,* 572

6. The evidence in this case is *held* to sustain the court's conclusion that there was no cancellation of a written contract for plaintiff to procure business on commission from an automobile company, and that the delivery of the commission contract to the president of the company agreeing to pay the commission was not a surrender of the contract but was upon the promise and condition that it would remain in force and cover all future orders from the automobile company. *Smith v. Crucible S. C. Co.* 308

Same: Forfeiture. See ESTOPPEL, 2, 5. INSURANCE, 3–5. MUNICIPAL CORPORATIONS, 6.

Same: Discharge by judgment.

7. A judgment in a proceeding to establish the status of the father of the defendant and of one of the plaintiffs as a poor person, which required the defendant to pay a stipulated sum for his support, does not estop the plaintiffs from recovering against defendant on a contract made by him to pay stated sums weekly to them for such support. *Berryman v. Larmer,* 572

Performance. See BROKERS, 4.

Breach: Failure to construct highway: Damages: Evidence.

8. A contract with a county for road work at a specified price per cubic yard which provided that, in case the contractor failed to complete the work by a designated time, the county might complete it at the expense of the contractor, is divisible and not entire, so that the contractor can recover for the work done by him before the default. *Bayfield County v. Ogren,* 169

9. Where such contract authorized the county to complete the contract in the event of failure of the contractor and made the contractor and his sureties liable for the expense of such completion in excess of the contract price, the county can recover from the contractor the amount it expended if it acted with due diligence, without negligence, and in good faith, though such amount was greater than the jury found to be the reasonable value of the completion of the contract. *Ibid.*

10. The testimony of experts as to the reasonable cost of completing the work is not always a satisfactory substitute for actual experience, and in the absence of negligence or fraud ought not to be admissible. *Ibid.*

Particular forms of contracts.

Employment. See WORKMEN'S COMPENSATION, 1–3.
Guaranty. See GUARANTY.

Particular forms of contracts—con.
Land. See VENDOR AND PURCHASER.
Patents. See PATENTS.
Sales. See SALES.
To make will. See EXECUTORS, 3. FRAUDS, STATUTE OF, 6.
Modification of contract. See CORPORATIONS, 11.
Rescission of contract. See CORPORATIONS, 9. SALES, 15, 16.
CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES. NEGLIGENCE. NEW TRIAL. RAILROADS, 1–7. STREET RAILWAYS, 9, 10, 12, 14.
CONVERSION. See PLEADING.

CORPORATIONS.

See BILLS AND NOTES, 1. GUARANTY, 1. REPLEVIN, 3. SALES, 3, 6, 7. TAXATION, 7–13, 17. WORKMEN'S COMPENSATION, 5, 6.

Amendment increasing capital stock: Rights of stockholders.

1. Upon an increase of the capital stock of a corporation a stockholder is entitled to maintain his proportionate voice and influence in the corporation, and for that reason must be given an opportunity to purchase a proportionate amount of the new shares before they can be offered to outsiders. *Hammer v. Cash,* 185
2. An amendment of the articles of a corporation increasing the amount of its authorized capital stock, merely authorizes and empowers the corporation to issue increased stock in such amounts and at such times as the corporation may determine; but there is no obligation to issue it. *Ibid.*
3. Where the articles of incorporation were amended so as to authorize an increase in the capital stock of a railroad company for the purpose of building an extension, and the resolution authorizing the increase provided that stock not necessary to be sold should be held in the treasury of the corporation, and neither stockholders nor directors had authorized the issue of any part of the increase, a stockholder is not entitled, by virtue of the amendment, to purchase a proportionate number of new shares; and where the extension was abandoned, an issue of a portion of said stock to certain stockholders, made by the president and secretary without the knowledge or authorization of the directors, was unlawful. *Ibid.*

Same: Validity of stock issued: Removal of officers.

4. An action in equity is necessary to determine the validity of an issue of corporate stock. *Hammer v. Cash,* 185
5. Where a court of equity had jurisdiction of a suit wherein the validity of an issue of stock was attacked, it may, on canceling the stock, remove officers and directors elected by the voting of such illegal shares, without compelling a second action by *quo warranto,* a court of equity having jurisdiction to determine the right to an office and to remove or enjoin an incumbent who is not entitled thereto, when it has jurisdiction on other grounds. *Ibid.*

Fraud in sale of stock: Remedies of purchaser.

6. In an action to recover the purchase price of corporate stock alleged to have been sold under false representations, a statement by the seller that the stock was sold at $8 a share in order to make future business friends, when it was worth $13.50 per share on the Chicago market, is *held,* in view of the circumstances, one upon which the purchaser was entitled to rely. *Schultz v. Andrews & Co.* 91
7. Where it appeared that the purchaser did not rescind the contract of purchase for five months, evidence that the conduct of the seller was a continuing tacit assurance that the stock could be resold at a profit made it a jury question as to whether plaintiff acted with reasonable promptness. *Ibid.*
8. Testimony of defendant's manager that the market was what defendant made it, is sufficient to relieve plaintiff from the burden of proving the value of the stock on the market at the time of the purchase. *Ibid.*
9. Where the complaint set forth one cause of action for damages for fraudulent representation and another for recovery of money paid after rescission of the contract, failure of defendant to demur is a waiver of the objection that the causes of action are inconsistent. *Ibid.*

Same: Sale of corporate stock. See FRAUDS, STATUTE OF, 12, 13.

Personal liability of stockholders: Subscriptions.

10. An action to enforce the personal liability of subscribers to stock of a corporation under sec. 1773, Stats., on the ground that fifty per cent. of the stock had not been subscribed, is an action at law and is not governed by secs. 3223–3228. *Shadbolt & Boyd Iron Co. v. Long,* 591
11. Where there was testimony that two partners turned in their business to a corporation in return for $6,400 in stock, and at the first meeting of the stockholders agreed to subscribe for further stock, and fifty per cent. of the stock was subscribed at such meeting and the assets of the partnership delivered to the corporation, a judgment dismissing a complaint in an action by a creditor to hold stockholders personally liable because one half of the capital stock had not been subscribed will not be disturbed because of entries made in the stock books after the first meeting. The effect of the first subscription could not be changed by subsequent irregularities, mistakes, or new agreements. *Ibid.*
12. An oral agreement to take $2,000 in corporate stock and a practically contemporaneous delivery of assets to the corporation in payment for $1,000 worth, is a single entire agreement, and the oral subscription was binding on both parties as to the $1,000 of stock not paid for. *Ibid.*

Officers: Liability for notes signed in official capacity.

13. To hold a director, who was also an employee, of a corporation personally liable on notes of the corporation which he has signed, there must be some element of deceit or fraud in that

which he did, or an express or implied warranty on his part that he had authority to bind the corporation. *Loveland v. Hanson,* 627

14. Where such director signed notes of the corporation because of representations of the payee's agent that other directors had assented thereto, the agent knowing that such director had no authority to execute the notes, he was not personally liable. *Ibid.*

Substitution of debtors. See NOVATION, 2, 3.

Municipal corporations. See MUNICIPAL CORPORATIONS.

Power of corporation to receive bequest. See WILLS, 18.

Liquidation. See BANKS.

COSTS.

On frivolous appeal.

In this case the appeal from the order of the circuit court being entirely frivolous, though the order is reversed because the circuit court had acquired no jurisdiction, appellant will recover no costs. *Todorovic v. Hirschberg,* 14

In county court. See EXECUTORS, 10.

In supreme court. See APPEAL, 7, 8.

In actions to construe will. See WILLS, 20, 21.

COTENANTS. See TENANCY IN COMMON.

COUNTERCLAIM. See PATENTS, 5. PLEADING.

COUNTIES.

Ordinances: Enforcement. See PENALTIES.

Construction of highways. See CONTRACTS, 8–10. DRAINS. HIGHWAYS, 4–6.

Right to elect county officers. See CONSTITUTIONAL LAW, 2, 3. ELECTIONS.

Sec. 9, art. XIII, Const., reserves to the people of a county the right to elect county officers unless otherwise provided for in the constitution. *State ex rel. Melms v. Young,* 197

COUNTY SUPERINTENDENT OF POOR. See PAUPERS.

COURTS.

Appellate courts: Jurisdiction: Costs. See COSTS.

1. An appellate court acquires no jurisdiction until the jurisdiction of the lower court is superseded, which occurs only when everything necessary to perfect the appeal has been done. *Todorovic v. Hirschberg,* 14

2. Where an appeal from the civil court of Milwaukee county to the circuit court had not been perfected by the payment of the fees required by ch. 320, Laws 1913, the circuit court had no jurisdiction and there was no appeal pending in it upon which an order of dismissal could operate, so that an order dismissing the appeal was a nullity. *Ibid.*

County courts: Jurisdiction: Construction of wills of nonresidents.

3. A county court having admitted the will of a nonresident to probate on a petition alleging the existence of creditors residing in Wisconsin and property within the state, its authority in the premises was limited to the administration of that part of the estate necessary to satisfy the claims of Wisconsin creditors, and, there being no Wisconsin creditors, an order attempting to construe the will was erroneous. *Will of Harker,* 99

4. The duties of trustees under a will are to be defined by the court of domiciliary administration. *Ibid.*

Supreme court. See APPEAL.

Circuit courts. See DIVORCE, 1. DRAINS, 3. PUBLIC UTILITIES, 3.

County courts. See EXECUTORS, 3–10. PAUPERS. TAXATION, 14. WILLS, 9–16.

Contempt of court. See INJUNCTION.

CRIMINAL LAW.

See FALSE PRETENSES. RAPE. WITNESSES, 1.

Practice of medicine without license: Evidence. See PHYSICIANS AND SURGEONS, 4.

1. Where on the trial of defendant for practicing medicine without a license there was evidence that he had treated a child on former occasions, the jury were not bound by the declaration in a card signed by the child's mother and by defendant's testimony that the treatment was gratuitous and that the charge made was only for medicine furnished, but could find that the card and the sale of the medicine was a mere subterfuge to avoid the prohibition of sec. 1435*h*, Stats. *Till v. State,* 266

2. Evidence of treatments of a child prior to the treatment alleged in the information is admissible to show intent, and particularly to negative the provision of sec. 1435*j*, Stats., excepting treatment rendered in an emergency. *Ibid.*

Continuance of trial. See CONTINUANCE.

Collection of penalty. See PENALTIES, 2–5.

Criminal contempt. See INJUNCTION.

Fugitives from justice. See EXTRADITION, 2.

Specific offenses.

Assault. See RAPE. WITNESSES, 1.
Contempt of court. See INJUNCTION.
False pretenses. See FALSE PRETENSES.
Practicing medicine without license. See CRIMINAL LAW. PHYSICIANS AND SURGEONS, 4.
Rape. See RAPE.

CROSSING ACCIDENTS. See RAILROADS, 4–7.

DAMAGES. See AUTOMOBILES, 14. BREACH OF MARRIAGE PROMISE, 3, 5. CONTRACTS, 9, 10. LANDLORD AND TENANT, 3. REPLEVIN, 2. SALES, 5, 11.

DAMS. See MUNICIPAL CORPORATIONS, 1–6. NUISANCES.

DEATH. See ACTION, 2. AUTOMOBILES, 12. HIGHWAYS, 6. RAILROADS, 1. WITNESSES, 3. WORKMEN'S COMPENSATION, 3.

DEBTOR AND CREDITOR. See ACCORD. ASSIGNMENTS. BAILMENT. BANKS AND BANKING. BILLS AND NOTES, 2. BROKERS, 8. CONTRACTS. CORPORATIONS, 11, 13, 14. COURTS, 3. DESCENT, 2. DRAINS, 3. EXECUTORS, 1, 2, 4, 5, 8, 9. FRAUDS, STATUTE OF, 1. GUARANTY. NOVATION. PATENTS. PLEADING. PUBLIC UTILITIES, 1. REPLEVIN, 3. TENDER. WORKMEN'S COMPENSATION, 1.

DECEIT. See CORPORATIONS, 13. FRAUD. JOINT ADVENTURERS.

DEEDS.

See FRAUD. REFORMATION.

Conditional deeds: Parol evidence: Consideration.

1. Where parents deeded their farm to their son on condition that he support them for life and make certain payments to other children on their becoming of age, and agreed that upon a sale of the farm by the son they would accept $1,000 in satisfaction of their rights, and subsequently, when the farm was sold by the son and the agreed sum paid them, they executed a quitclaim deed, a finding of the court as to the understanding of the parties when the quitclaim deed was made will not be disturbed, although parol evidence was received, as this line of testimony was not objected to by appellant but was in fact first offered by him. *Lepak v. Lepak,* 617
2. Where a grantee in a deed, as part of the consideration, agreed to pay money to third parties, the situation of debtor and creditor arose between the grantee and such persons, even though no consideration passed from them and irrespective of whether they knew of the conveyance or not. *Ibid.*

DEFINITIONS. See WORDS AND PHRASES.

DELEGATION of legislative power. See PUBLIC UTILITIES, 2.

DEMURRER. See ACTION, 2. APPEAL, 18, 19. BROKERS, 6. CONSTITUTIONAL LAW, 1.

DENTISTS. See PHYSICIANS.

DEPENDENCY. See WORKMEN'S COMPENSATION, 2, 7, 10.

DEPOTS. See RAILROADS, 1, 2.

DESCENT AND DISTRIBUTION.

See ADVERSE POSSESSION, 1.

Title to personal property: Transfer.

1. The title to personal property does not pass from a deceased person without administration of the estate and a due assignment of property by the personal representative; and heirs as individuals have no right of action for services rendered by their ancestor, such right being in the administrator. *Estate of Leu,* 530

2. A claim filed against an estate by the heirs as individuals could not be amended, after the expiration of the statutory period for the presentation of claims, by making it a claim by the ancestor's administratrix. *Ibid.*

Property derived from parent: Ancestral estate.

3. Sub. (5), sec. 2270, Stats., providing that, on the death of a minor unmarried, property descending to him from a deceased parent will go to the other children of the same parent, and not to a parent as provided by sub. (2), sec. 2270, is in the nature of an exception to the general purpose of the statutes of descent, which is that intestate estate shall, where no other provision is made, descend to the next of kin of the deceased irrespective of whether or not it is ancestral estate. *Estate of Spooner,* 174

4. The words "parent" and "child" in sub. (5), sec. 2270, Stats., providing that on the death of a minor unmarried child his property should pass to the children of the parent from whom the child inherited or received it by testamentary gift, should not be construed to include grandparents or grandchildren, even though it results in devolving the estate on a stranger to the blood of the person from whom the estate descended. *Ibid.*

DESTRUCTION OF WILL. See WITNESSES, 5.

DIKES. See NAVIGABLE WATERS, 4, 5.

DIRECTOR GENERAL. See RAILROADS, 8.

DIRECTORS. See CORPORATIONS, 5.

DISCRETION.
Of court. See APPEAL, 20. BANKS, 4. DIVORCE, 3. RAPE, 1.
Of railroad commission. See PUBLIC UTILITIES, 5.

DISCRIMINATION. See PUBLIC UTILITIES, 5.

DISPOSITION OF CASE. See APPEAL, 18. AUTOMOBILES, 14.

DISTRIBUTION. See BANKS, 5. DESCENT. WILLS.

DITCHES. See DRAINS.

DIVIDENDS. See BANKS, 5. TAXATION, 8, 13.

DIVISION OF ESTATE. See DIVORCE, 2.

DIVORCE.

Vacation of judgment: Reopening of case. See APPEAL, 3.

1. The statutory powers of the court over judgments of divorce are to be liberally exercised, and in a proceeding by a wife against her husband to procure the vacation of a judgment of divorce within one year after its rendition, the fact that the wife was mentally incompetent when the action was tried but was subsequently restored to sanity is persuasive ground justifying the trial court in reopening the case. *Moran v. Moran,* 59

Division of estate: Appointment of trustee.

2. Under sec. 2364, Stats., a judgment in an action for divorce brought by the wife which divested her of title to a vacant lot

and gave it to the husband and which required him to pay to the wife $1,400 in cash, is not inequitable, the total property accumulated by the joint efforts of the parties being about $3,640 and the wife having derived the vacant lot from the husband. *Slowikowski v. Slowikowski,* 460

3. Under sec. 2368, Stats., it is discretionary with the court whether or not to appoint a trustee to receive any money adjudged the plaintiff wife, and an order appointing a trustee will not be disturbed on appeal except for abuse of discretion. *Ibid.*

DOWER. See ADVERSE POSSESSION, 2.

DRAINS.

See NAVIGABLE WATERS, 4.

Liability of county: Assessment of benefits: Enforcement of order.

1. A county charged with the obligation to maintain trunk highways may be benefited by the drainage of the lands upon which such highways are located, and under sec. 1379—10*b*, Stats. 1919, are subject to the same burdens respecting contributions to pay the cost of establishing a drainage system as are cities, towns, and villages. *In re Door Creek D. Dist.* 431
2. In view of the statutes making counties liable for damages caused by defects in trunk-line highways and for the cost of their maintenance in excess of refunds from the state, an assessment of benefits for a drainage system inures to the advantage of the county. *Ibid.*
3. While a tax is not enforceable as a debt unless provided by the legislature, an order assessing benefits, made in statutory proceedings to establish a drainage district, is the culmination of a judicial proceeding; and an order made assessing benefits against a county may be enforced by any and all processes inherent in courts of justice. *Ibid.*

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 1.

DUES. See INSURANCE, 4, 5.

DURATION OF CONTRACT. See BROKERS, 1, 2.

EASEMENTS. See NAVIGABLE WATERS, 3–6.

ELECTIONS.

See CONSTITUTIONAL LAW, 3. SCHOOLS, 1.

Regulation of elective franchise.

The elective franchise may be regulated to prevent corruption and secure to the elector an honest and orderly exercise of the right to cast his ballot. *State ex rel. Melms v. Young,* 197

ELECTRICITY. See WORKMEN'S COMPENSATION, 3.

EMERGENCY ORDER. See PUBLIC UTILITIES, 4–7.

EMPLOYERS' LIABILITY. See WORKMEN'S COMPENSATION.

ENACTMENT OF STATUTES. See STATUTES.

ENDOWMENT POLICY. See INSURANCE, 1, 2.

EQUITY. See ADVERSE POSSESSION, 3. APPEAL, 3. CORPORATIONS, 4, 5, 10. DIVORCE. ESTOPPEL, 4, 5. FRAUD, 2. INJUNCTION. JOINT ADVENTURERS, 4. JUDGMENT, 3, 4. MECHANICS' LIENS. NAVIGABLE WATERS, 2. PATENTS, 4, 5. REFORMATION.

ERROR. See APPEAL AND ERROR.

ESTATES in land. See FRAUDS, STATUTE OF, 2–5.

ESTOPPEL.

See ADVERSE POSSESSION, 1. CONTRACTS, 7. JUDGMENT, 4. PATENTS, 1. TAXATION, 21. WORKMEN'S COMPENSATION, 7.

Waiver: Municipal corporations: Estoppel to declare forfeiture.

1. Waiver is the voluntary relinquishment of a known right and may be a defense though no detriment to the adverse party is shown; but in estoppel the existence of the truth of the fact complained of is not denied, but the right of the other party to complain thereof is denied because his previous conduct has caused the party asserting the estoppel to change his position in such a way that loss to him would result if the estoppel were not interposed. Conduct may be positive or negative, so that silence, where it is a duty to speak, may constitute an estoppel *in pais. Eau Claire Dells Imp. Co. v. Eau Claire,* 240
2. A city may be estopped to declare a forfeiture of a contract for acts which it encouraged, even though such acts were a violation of state laws, since the estoppel is not urged as authority for violation of the law, but merely against the city's contract right to declare a forfeiture. *Ibid.*
3. Where the contractual rights of the parties spring from a proprietary and not from a governmental exercise of municipal power, estoppel can be urged against the municipality on the same grounds and sustained by the same proof that is essential against a private person. *Ibid.*
4. In an action to restrain the forfeiture of a lease because the city was estopped from declaring a forfeiture for acts in violation thereof, the decree should not restrain the city from influencing state officials to interfere with such use of the property, since, if the use was lawful, no interference will be presumed, and if it was unlawful the attention of officials should be called thereto. *Ibid.*
5. Provisions in the decree enjoining the city from forfeiting the lease for acts it was estopped to question so long as the state did not compel the discontinuance of the acts, were objectionable as permitting a forfeiture by the city for past acts in case the state should declare them unlawful, and should be modified to permit forfeiture only for the continuance of the acts after they were declared unlawful. *Ibid.*

EVICTION. See LANDLORD AND TENANT, 3.

EVIDENCE.

See BROKERS, 7. CRIMINAL LAW, 1, 2. STREET RAILWAYS, 15.

Judicial notice: Knowledge of trial court: Usages of trade. See PHYSICIANS, 7. PUBLIC UTILITIES, 7. RAILROADS, 7.

1. The knowledge of the trial court, as an individual, of facts as to a road being a county or state rather than a town highway, is not the kind of knowledge that is included in the broad field of subjects of general knowledge of which a court, as such, may take judicial notice. *Kuder v. State,* 141
2. The usage of trade that, when a specified machine is ordered, both parties contemplate a new machine, is so universal as to be the subject of judicial notice. *Fox v. Boldt,* 333

Res gestæ: Declarations after event: Admissions.

3. Statements made by the driver of an automobile, immediately after a collision with another car and at the place of collision, are a part of the *res gestæ,* being on the same footing as any other facts relating to the immediate transaction. *John v. Pierce,* 44
4. Declarations of an insured person to his physicians, made some days subsequent to an accident, as to the cause of an injury he received, are inadmissible, being hearsay and not a part of the *res gestæ. Maine v. Maryland C. Co.* 350
5. Where statements were received as part of the *res gestæ,* as were also statements in the nature of admissions, it was error in instructing the jury not to point out the distinction between the two classes of evidence, as the jury might infer they were to use more caution in believing the testimony as to conversations which were part of the *res gestæ* than the testimony as to other facts immediately surrounding the transaction. *John v. Pierce,* 44

Declarations. See FALSE PRETENSES, 1. RAPE, 1. WILLS, 8.

Opinion evidence. See APPEAL, 13. CONTRACTS, 10. PHYSICIANS AND SURGEONS, 7.

Admissions: Correspondence between contracting parties. See FRAUDS, STATUTE OF, 11.

6. Correspondence between the parties after a contract was alleged to have been made and before action was commenced, stating the claims of the parties as to the existence of the contract and its contents, is admissible as tending to show the claims or admissions by silence or failure of denial of the parties. *Mahoney v. Kennedy,* 568

Parol evidence. See CONTRACTS, 3. INSURANCE, 1. LANDLORD AND TENANT, 2. SALES, 1, 8.

Weight and sufficiency. See APPEAL, 14. ASSIGNMENTS. AUTOMOBILES, 2, 3, 13, 14. BREACH OF MARRIAGE PROMISE, 1. CONTRACTS, 6. CORPORATIONS, 8. CRIMINAL LAW, 1. DEEDS, 1. EXECUTORS, 7. FALSE PRETENSES, 2. GUARANTY, 1. INSURANCE, 2. MECHANICS' LIENS, 2. NOVATION, 2. PUBLIC

UTILITIES, 7. REFORMATION. REPLEVIN, 3. STREET RAILWAYS, 9, 11, 13. TAXATION, 4–6. WORKMEN'S COMPENSATION. 3.

Relevancy, materiality, and competency. See APPEAL, 4. BREACH OF MARRIAGE PROMISE, 3. CONTRACTS, 3, 4, 10. CRIMINAL LAW, 2. FALSE PRETENSES. INSURANCE, 1. LANDLORD AND TENANT, 2. RAPE, 1. SALES, 1. TAXATION, 9–11. WILLS, 8. WITNESSES.

Competency of witnesses. See WITNESSES.

Hearsay. See RAPE, 2.

Transactions with deceased persons. See WITNESSES, 4, 5.

EXCHANGE OF PROPERTY. See FRAUD, 3. FRAUDS, STATUTE OF, 5. TAXATION, 11.

EXECUTION SALE. See BAILMENT, 2. REPLEVIN, 3.

EXECUTORS AND ADMINISTRATORS.

See BANKS, 7, 9. DESCENT. WILLS. WITNESSES, 2. WORKMEN'S COMPENSATION, 3.

Breach of duty: Failure to account for assets: Interest.

1. Where a trust company, as executor of the estate of a deceased client for whom it had invested money, received a substantial amount on account of bonds in which it had invested the funds of the client, it breached its duty as executor in failing to see to it that the proportionate share of the payment on account of the bonds was turned into the assets of the estate. *Wisconsin Trust Co. v. Cousins,* 486
2. Interest is allowable on the amount of a liability of an executor for breach of duty in failing to prosecute a cause of action from the date when, by its failure to act within the statutory period, the right against it for its breach of duty became fixed. *Ibid.*

Claims against estates: Promise to make will: Accrual of action.

3. Where services are rendered on the promise of compensation in the form of a legacy, the time of payment is postponed until the death of the promisor, and the cause of action does not arise in favor of the party rendering the services until such death. *Estate of Leu,* 530
4. After the time limited for filing claims against the estate of C. L. had expired a special administratrix was appointed for one A. L., who filed a claim for services rendered C. L. by A. L. under a promise to devise real estate. *Held* that, the cause of action having accrued during the lifetime of A. L., the claim is barred because not filed within the time limited. *Barry v. Minahan,* 127 Wis. 570, followed. *Ibid.*
5. Recovery cannot be had for services rendered to a decedent more than six years prior to his death, pursuant to a void promise to devise real estate, where payments have not been made so as to constitute a mutual account. *Ibid.*

Same: Amendment of claim. See DESCENT, 2.

6. Although the original claim filed against the estate of a decedent in the county court alleged that a loan made to the deceased was evidenced by a writing, the action of the circuit court, after appeal, in allowing claimant to amend the claim by alleging the facts as to the loan in the form of a separate count without reference to the writing, was not improper, as such amendment did not withdraw the claim first filed, but merely allowed plaintiff to recover on the loan if legally established by other evidence in case he failed to establish that the writing was given by decedent. *Klukas v. Linderman,* 388

7. Where the trial court saw the witnesses and heard their testimony, which was conflicting, it was the best judge of the weight thereof; and it is *held* that a finding that the deceased was not indebted to claimant at the time of his death is not against the clear preponderance of the evidence. *Ibid.*

Same: Trial of claim: Appearance by creditor: Costs.

8. In proceedings against the estate of a decedent by a creditor claiming a lien on certain stock, in which the present claimant, also a creditor, appeared to contest allowance of the lien, involving merely the issue of whether the first creditor was entitled to such lien, the judgment rendered was not conclusive as to whether the present claimant was entitled to a lien on the stock, his right thereto not being in issue. *Merrill v. Focht,* 575

9. Any creditor of the estate of a deceased person has an interest in the denial of any claim filed and may appear and oppose its allowance. *Ibid.*

10. Where in such proceedings the contestant of the lien was the principal, if not the sole, objector to the allowance thereof, and the executrix made no appearance in the supreme court on claimant's appeal from the judgment disallowing the lien, this court, in reversing the judgment, will tax costs against contestant and not against the executrix. *Ibid.*

EXPLOSIVES. See NEGLIGENCE, 1, 2.

EXTRADITION.

What law governs: Fugitives from justice.

1. Extradition being a proceeding founded upon the federal constitution and laws, the decisions of the United States supreme court govern the construction that must be given to the provisions relating thereto. *In re Henke,* 36

2. A person who, after committing a crime, leaves the state, in whatever way or for whatever reason, and is found in another state, is a fugitive from justice, the motive inducing his departure from or his intent to return to the demanding state being immaterial, as is also the fact that he could have been arrested in the demanding state or that he left with the knowledge or consent of the prosecuting witness. *Ibid.*

FACTORS. See BROKERS.

FALSE PRETENSES.

Declarations of conspirators: Amount received: Evidence.

1. Where defendant and others entered into a conspiracy to hold a Fourth of July celebration and falsely represented that the proceeds of the celebration would be turned over to the American Red Cross Association, declarations of the other co-conspirators, made prior to the division of the money, were admissible against defendant on trial for obtaining money under false pretenses. *State v. Labuwi,* 204
2. The evidence in this case, although circumstantial, is *held* to show beyond a reasonable doubt that more than $100 was received from people who patronized the celebration because of the false representations, so as to make applicable the greater penalty provided for by sec. 4423, Stats. *Ibid.*

FALSE REPRESENTATIONS. See FALSE PRETENSES. FRAUD.

FEDERAL CONTROL OF RAILROADS. See RAILROADS, 8.

FEDERAL QUESTIONS. See EXTRADITION.

FEDERAL TRANSPORTATION ACT. See RAILROADS, 8.

FIDUCIARY RELATIONS. See BANKS, 2.

FINDINGS OF FACT.
By assessor. See TAXATION, 4, 5.
By court. See APPEAL, 5, 14. REPLEVIN, 3. TENDER.
By industrial commission. See WORKMEN'S COMPENSATION, 2, 6.

FIRE INSURANCE. See INSURANCE.

FISHING. See NAVIGABLE WATERS, 5.

FIXTURES. See TAXATION, 3.

FORECLOSURE of mechanics' liens. See MECHANICS' LIENS, 2, 3.

FORFEITURE. See INSURANCE, 3–5. MUNICIPAL CORPORATIONS, 6. PENALTIES.

FORMER JEOPARDY. See PENALTIES, 2.

FRANCHISES. See STREET RAILWAYS, 1–8.

FRATERNAL ORDERS. See INSURANCE, 3.

FRAUD.

See CONTRACTS, 10. CORPORATIONS, 6–9. JOINT ADVENTURERS. PATENTS, 4.

False representations of vendor of land: Taking property in name of wife. See FALSE PRETENSES.

1. A transaction whereby a husband, without consideration and by means of fraudulent representations, procured the title to the property of another to be transferred to his wife, so that if she be a good-faith purchaser the title will be lost to the true owner, is properly viewed with suspicion by the courts and should be very closely scrutinized on account of the inducements and facilities offered for fraud. *Spangler v. Kittel,* 583
2. Where the wife, a woman of more than average intelligence and well able to take care of herself in business transactions

and who knew her husband was having financial difficulties, received a deed from a grantor with whom she had never had any dealings, which recited a consideration of $25,000, and in return therefor gave merely $5,000 of worthless bonds and assumed a mortgage of $12,000, without making inquiries from any person other than her husband, the deed, which had been procured by the husband from the grantor by fraud, will be canceled, the wife not being a *bona fide* purchaser, since under the circumstances she should have made inquiries, which would have revealed the fraudulent transaction. *Ibid.*

3. One who induced another to enter into a contract for the exchange of real property by statements that the title to the land to be exchanged was merchantable and subject to only one incumbrance, and who procured a deed to plaintiff's land by the statement that a deed to the land to be exchanged therefor was ready for delivery, when in fact there was no such deed and the land was incumbered for more than $100,000 in addition to the stated incumbrance, was guilty of fraud, even though the statements were not knowingly untrue, since they were so recklessly in disregard of the truth as to be fraudulent. *Ibid.*

FRAUDS, STATUTE OF.

Promise to pay debt to another: Consideration.

1. Though a promise may be in form to pay the debt of another, if it is founded upon a new and valuable consideration moving from the creditor and promisee to the promisor and is beneficial to the latter it is not within the statute of frauds. *W. C. Zachow Co. v. Grignon,* 449

Creating estate in lands.

2. A memorandum of sale covering a wife's real estate, made by the husband, who signed the name of the wife, is sufficient under sec. 2304, Stats., where it describes the property and states the purchase price and terms of payment. *Russell v. Ives,* 123

3. An oral acceptance of a written option to sell land is valid. *Ibid.*

4. An agreement between real-estate agents to divide profits arising from an exchange of property and the sale of that taken by one of the parties to the exchange does not create any estate or interest in or any trust or power over or concerning lands, nor is it a contract for the sale of any land or interest in land, so as to be affected by secs. 2302, 2304, Stats. *Etscheid v. Tiefenthaler,* 273

5. The invalidity of an oral contract by one who took land in exchange for other property to convey the land to parties designated by the real-estate agents on payment of the agents' note, does not invalidate an agreement between the agents for the division of the profits arising from the transaction after the owner had performed his contract to convey. *Ibid.*

Same: Promise to devise lands.

6. An oral promise to compensate for services by a devise of real estate in whole or in part is void and can be resorted to for no purpose except to rebut the presumption, where it exists, that the services were gratuitously rendered; and a cause of action accrues when the services are rendered. *Estate of Kessler,* 87 Wis. 660, overruled. *Estate of Leu,* 530

Lease for more than a year: Improvements.

7. Where an oral lease was made in August for one year, with the privilege of three years, to begin from the following September 1st, so much of the arrangement as gave the tenant the right of possession at the specified rental for the term of one year was binding and effective; but so much of the agreement as purported to grant the tenant any right to possession after the expiration of the first year was within the statute of frauds. *Falk v. Devendorf,* 10

8. The oral agreement of the landlord to subsequently execute a writing to give validity to his oral three-year lease was void. *Ibid.*

9. The tenant having a three-year oral lease, his taking possession of the premises was referable to the rights he acquired and which were acquiesced in by his landlord under that portion of his lease which was valid as a lease for one year. *Ibid.*

10. The fact that the tenant under the void oral lease did some electric wiring in the premises does not show a substantial improvement to the premises themselves, of benefit to the owner, or the doing of something outside of the mere agreement for leasing, such as would bring it within any of the rules warranting specific performance of the void oral agreement. *Ibid.*

Same: Instrument executed after ownership ceased.

11. A written statement by the former owner of the premises, declaring the terms of the oral agreement under which the defendant tenant claimed, not signed until after such owner had sold to plaintiff, was not binding on plaintiff. *Falk v. Devendorf,* 10

Sale of corporate stock: Part performance.

12. Under secs. 1751 and 1751*n*—10, Stats., the capital stock of a corporation is personal property, and a sale thereof comes within the statute of frauds (sec. 2308) unless taken out by part performance. *Mahoney v. Kennedy,* 568

13. A contract for the sale of the capital stock of a corporation engaged in publishing a newspaper, where no certificates of stock had been issued or printed, was partly performed so as to be taken out of the statute of frauds where the seller, who owned a controlling interest in the corporation, resigned his office, delivered possession to the buyers, and they, by an agent, assumed control and management of the corporation. *Ibid.*

FRIVOLOUS APPEAL. See APPEAL, 18, 19. COSTS.
FUNERAL EXPENSES. See WORKMEN'S COMPENSATION, 7.
FUTURE ESTATES. See WILLS, 11.
GATES. See RAILROADS, 1, 7.
GIFTS. See WILLS, 18.
GOVERNOR. See ATTORNEY GENERAL, 2. WORKMEN'S COMPENSATION, 11.

GUARANTY.

Construction: Period covered by guaranty.

1. A guaranty by the president of a lumber company, running to a manufacturer of building materials and woodwork, of the lumber company's account, both book and notes, made in June, 1915, is *held,* under the course of dealing between the manufacturer and the lumber company, to have covered only transactions occurring up to November 20, 1915, when the account was closed and settled, and not to render the guarantor president liable for indebtedness of the lumber company to the plaintiff incurred in 1916 and 1917. *Curtis & Yale Co. v. Wunderlich,* 446
2. A guaranty will be construed to be prospective rather than retrospective unless it clearly appears that the parties intended it to cover past transactions. *Ibid.*

GUESTS. See AUTOMOBILES, 15. NEGLIGENCE, 1.
HARMLESS ERROR. See APPEAL, 15–17.
HEARSAY. See EVIDENCE, 4.
HEIRS. See ADVERSE POSSESSION, 1, 2.

HIGHWAYS.

See AUTOMOBILES. CONTRACTS, 8–10. DRAINS, 1, 2. EVIDENCE, 1. NEGLIGENCE.

Laying out town highways: Procedure.

1. The minutes of a town board reciting that the board met at a certain time and place to examine the location for a highway, the petition for which had been filed, and that a named party had agreed to make the road passable for a certain distance, and that the board agreed to act upon the petition, are *held* not to show action on the petition within sixty days from its filing, and hence there was a refusal to act on the petition under sec. 1276, Stats. *State ex rel. Loehr v. Hanson,* 181
2. Under said sec. 1276, providing that if town supervisors fail to act on a petition for the laying out of a highway within sixty days after the filing of the petition they shall be deemed to have refused the petition, final action within such time is not necessary, it being sufficient that any action required by the statute in response to the filing of the application was taken. *Ibid.*

3. Official action, within the meaning of sec. 1276, contemplates the performance of some of those legal duties resulting from the filing of the petition. *Ibid.*

Maintenance of main trunk highways: Attractive nuisances.

4. Under sec. 1317, Stats., requiring each county to maintain state trunk highways within the county, sub. 5 of which authorizes claims for damages due to the insufficiency of the trunk system to be against the county, counties are placed in the same relation and have the same legal duties respecting the maintenance of the state trunk highways and liability for defaults in the performance of such duties as were formerly imposed on towns, cities, and villages. *Matson v. Dane County,* 522

5. While the maintenance of a state trunk highway by a county may be a governmental function with regard to the rights of the public traveling thereon, it is not such a function with respect to injuries thereby occasioned to the owners of the adjoining property. As to them, the county acts in a proprietary capacity and is liable for injuries resulting from its acts. *Ibid.*

6. A complaint by tenants occupying land along a highway that a culvert thereunder had been improperly constructed so as to erode a portion of the land occupied by plaintiffs and create a water-hole, which appeared to be a mere pond but which was in fact a dangerous trap, especially attractive to children, and that plaintiffs' children fell into the water-hole and were drowned, states a cause of action in favor of the plaintiffs for the alleged injury. *Ibid.*

Law of the road. See AUTOMOBILES.

HISTORICAL SOCIETY. See WILLS, 17–19.

HOMESTEAD. See ADVERSE POSSESSION, 2.

HUNTING. See NAVIGABLE WATERS, 5.

HUSBAND AND WIFE. See ADVERSE POSSESSION, 1, 2. BANKS, 2. CONTRACTS, 1. DIVORCE. FRAUD, 1, 2. FRAUDS, STATUTE OF, 2. INSURANCE, 5. WILLS, 1, 2, 14, 17. WITNESSES, 1, 5. WORKMEN'S COMPENSATION, 3.

IMPLIED WARRANTY. See SALES, 8, 10.

IMPROVEMENTS. See ADVERSE POSSESSION, 3. FRAUDS, STATUTE OF, 10. TAXATION, 2.

IMPUTED NEGLIGENCE. See STREET RAILWAYS, 10.

INCOME TAX. See TAXATION, 6.

INCREASE OF CAPITAL STOCK. See CORPORATIONS, 1–3.

INDETERMINATE PERMIT. See STREET RAILWAYS, 3.

INFANTS. See DESCENT, 3, 4. STREET RAILWAYS, 9, 10. WORKMEN'S COMPENSATION, 10.

INFRINGEMENT. See PATENTS.

INJUNCTION.

See CORPORATIONS, 5. ESTOPPEL, 4, 5. NAVIGABLE WATERS, 2.

Contempt of court: Appeal.

1. A criminal contempt is an offense against the authority and dignity of the court, and the offense is public although committed in the course of private litigation. *State ex rel. Oshkosh T. Co. v. Goerlitz,* 581
2. No appeal lies from an order finding defendants guilty of contempt and fixing punishment, and there is no authority in the court to stay proceedings and sentence. *Ibid.*

INSANE PERSONS. See DIVORCE, 1. WILLS, 1, 2.

INSTRUCTIONS TO JURY. See APPEAL, 17. AUTOMOBILES, 1, 10. BREACH OF MARRIAGE PROMISE, 2, 4. EVIDENCE, 5. RAILROADS, 4, 5. TRIAL, 2, 3.

INSURANCE.

See EVIDENCE, 4. WITNESSES, 2, 3.

Revocation or suspension of option clause: Correspondence between the parties.

1. Where a life insurance policy, with the indorsements thereon, did not fully express the arrangements made by the parties when the contract was negotiated, correspondence between them was competent to show their understanding as to whether a clause in the policy had been revoked or suspended. *Montague v. Northwestern Mut. L. Ins. Co.* 192
2. In an action on an endowment policy involving the issue of whether the proceeds of the policy were payable in a lump sum or by instalments under an option clause, the evidence is *held* to support a finding that a request for an option settlement was not revoked by a change of beneficiaries, made necessary when the insured secured a loan on the policy, and that it was in full force on insured's death after reinstatement of the original beneficiaries. *Ibid.*

Fraternal orders: Engaging in business with hazardous risk: Waiver.

3. Where a member of a beneficial order, without obtaining a permit from the order, engaged in a business which was a hazardous risk under the rules of the order, and paid double monthly dues, as he would have been required to do in case he had secured a permit, such payments during the time he had no permit would not have operated to prevent a forfeiture of the contract, had the order insisted upon it; but the order, by receiving such payments knowing the facts, waived the forfeiture. *Clune v. Catholic Order of Foresters,* 79
4. Although the order, by receiving for a period of six months the double monthly dues, waived its right to forfeit the contract because the member had not, in addition to paying double dues, secured the order's permit to engage in such business,

yet, since he was required to pay such double dues only from the time the permit was granted him, he overpaid during such six months; and the order could not insist upon retaining such overpayments; they having been made under a mistake of fact, and was bound to account for them and apply them, to prevent a forfeiture, upon subsequent monthly payments until exhausted. *Ibid.*

5. Where, after such member was notified of his suspension from the order because of nonpayment of dues, and his dues were tendered until the plaintiff, his wife, was informed by the order that he was no longer a member, she was under no duty to tender further dues. *Ibid.*

INTENT. See CRIMINAL LAW, 2. WILLS, 9. WORKMEN'S COMPENSATION, 8.

INTEREST. See EXECUTORS, 2. TAXATION, 24.

INTERURBAN RAILROADS. See STREET RAILWAYS.

INVENTION. See PATENTS.

INVITEE. See NEGLIGENCE, 3.

JOINT ADVENTURERS.

Duties of members inter se: Secret profits: Accounting.

1. When one becomes a member of a group united to prosecute a common enterprise such as the purchase of property, each member owes to every other member the duty of fair, open, and honest disclosure, and no member can, by connivance, deceit, or suppression of facts within the right or to the advantage of any other member to know, procure or accept secret profits, commissions, or rebates to the disadvantage of the others; and he holds gains acquired by his breach of faith for the common benefit of his associates in proportion to their respective interests. A violation of his duty constitutes actionable fraud, and the usual remedies for the redress of fraud are available. *Goldman v. Cosgrove,* 462

2. Where defendants, seeking to interest plaintiffs and others in the acquisition of an oil property, not only suppressed the fact that there was a $50,000 secret profit to them, but positively represented that the only commission on the purchase was one of $10,000, which the owner was paying to two of them and which they were reinvesting in the property, co-investors can recover for such fraud, the defendants being charged with the duty of full and fair disclosure of all material and important facts. *Ibid.*

3. Where defendants learned that an owner of oil property would take $150,000 for his property, and, acting on the information, endeavored to make a sale for $200,000 to a syndicate organized by them, in forming the syndicate and becoming investors the duty they assumed towards their co-investors would prevent their securing a secret profit. *Ibid.*

4. A defendant who knew that two of his associates were making a secret profit in an enterprise they were promoting, and, assuming he would participate in such profit, endeavored to

secure other investors to whom he represented that every one was coming in on an equal basis, and who later received a share of the profit, must account therefor in an action by his co-investors. Where it appeared that such defendant had put it out of his power to convey the larger part of his interest, unlawfully acquired, a money judgment will be entered against him as a joint tortfeasor for the entire amount of the secret profit. *Ibid.*

JUDGMENT.

See CERTIORARI, 1. CONTRACTS, 7. DIVORCE, 1, 3. JOINT ADVENTURERS, 4. PENALTIES, 1. REPLEVIN, 2.

Judgment as bar: Res adjudicata.

1. A judgment is a complete bar in a subsequent action between the same parties, not only as to every point actually presented and decided in the former action, but also as to every point which might have been decided and presented therein, when the second action is upon the same cause of action; but when the second action is upon a different claim or cause of action, the former judgment is only a bar as to matters actually presented and litigated therein. *Reinkey v. Wilkins,* 515

2. A point or question is in issue in an action so as to be concluded by a judgment therein when an issue concerning it is directly tendered by the pleadings; but a matter which is neither pleaded nor brought into the contest is not in issue although within the general scope of the litigation and although it might have been determined by the judgment if it had been set up and tried. *Ibid.*

Same: Judgment in partition as bar to action of waste: Estoppel.

3. Under secs. 3102, 3105, Stats., a judgment in a partition action in which there was no issue as to waste does not estop cotenants from bringing a subsequent action against another cotenant for waste committed during the interval between the commencement of the previous action and the judgment therein. *Reinkey v. Wilkins,* 515

4. A judgment in partition would not have estopped cotenants from bringing an action against another cotenant for waste committed between the commencement of the partition action and the rendition of judgment, even though the pleadings presented an issue as to waste committed prior to the commencement of such action, where the cause of action as to waste committed subsequent to commencement of the action was not litigated. *Ibid.*

JUDICIAL NOTICE. See EVIDENCE, 1, 2.

JURISDICTION. See BANKS, 2. COURTS. REPLEVIN, 1. WILLS, 14. WORKMEN'S COMPENSATION, 9, 11.

JURY. See APPEAL, 11. NEW TRIAL. TRIAL, 1.

LAKES. See NAVIGABLE WATERS, 3, 4.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See ESTOPPEL, 4, 5. FRAUDS, STATUTE OF, 7–11. MUNICIPAL CORPORATIONS, 2, 3, 5, 6. TAXATION, 3.

Assignment of lease: Liability of lessee.

1. A brewing company making advances to saloon-keepers and taking as security an assignment of their lease, and, to procure the consent of the landlord to the assignment, agreeing in writing "to perform all the terms . . . of said lease," is presently liable for the rent. *H. H. Camp Co. v. Pabst B. Co.* 211
2. The agreement being clear and unambiguous upon its face and as applied to the subject matter, there is no room for construction nor for oral testimony to show the intent of the parties in entering into it. *Ibid.*

Duty of landlord to mitigate damages.

3. The landlord is under no obligation to mitigate damages in behalf of those liable for the rent by evicting the tenant and reletting the premises. *H. H. Camp Co. v. Pabst B. Co.* 211

LAW OF THE ROAD. See AUTOMOBILES.

LEASE. See BAILMENT. FRAUDS, STATUTE OF, 7–10. LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 2, 3, 5, 6.

LEGACIES. See WILLS.

LEGISLATURE. See STATUTES, 1, 3.

LICENSES. See BAILMENT. PHYSICIANS, 1–4.

LIENS. See EXECUTORS, 8. MECHANICS' LIENS.

LIFE ESTATES. See WILLS, 11, 14.

LIFE INSURANCE. See INSURANCE.

LIMITATION OF ACTIONS. See BANKS, 1, 2, 7, 8. EXECUTORS, 4, 5. WORKMEN'S COMPENSATION, 9.

LIQUIDATION. See BANKS.

MALPRACTICE. See PHYSICIANS, 5, 9.

MARRIAGE. See ADVERSE POSSESSION, 2. DIVORCE.

MATERIALMEN. See MECHANICS' LIENS, 3.

MASTER AND SERVANT. See NEGLIGENCE, 5. WORKMEN'S COMPENSATION.

MAXIMS.
Res ipsa loquitur, 20, 22, 23, 421, 423.
Res judicata pro veritate accipitur, 578, 579.

MECHANICS' LIENS.

Release of lien: Waiver to extent of payment received.

1. The alleged release by a subcontractor on a building whereby he "hereby waives his lien upon the above said premises for the said amount but reserves his rights under the contract

for the balance of the amount due under his contract," released the lien only to the extent of the amount paid to the subcontractor. *Tingley v. Richter,* 16

2. In an action to foreclose mechanics' liens, the evidence is *held* to show that a materialman's written release was intended by the parties to release its lien only to the extent of the amount the owner would pay on a sixty-day note previously given to the materialman. *Ibid.*

Defective materials repaired and used.

3. Where defects in windows furnished by a materialman were remedied by the builder before they were used and the cost deducted from the price, the owner is liable to the materialman in an action to foreclose his lien, on the theory that after repairing the defects the windows were accepted. *Tingley v. Richter,* 16

MEDICAL EXAMINERS. See PHYSICIANS, 2. STATES.

MERCHANTABLE TITLE. See VENDOR AND PURCHASER, 1.

MISREPRESENTATIONS. See FRAUD.

MISTAKE. See INSURANCE, 4. REPLEVIN, 2.

MITIGATION of damages. See LANDLORD AND TENANT, 3.

MODIFICATION of contract. See PATENTS, 4.

MONEY HAD AND RECEIVED. See CORPORATIONS, 9.

MOTIONS.
After verdict. See TRIAL, 1.
For continuance. See CONTINUANCE.
For new trial. See APPEAL, 12. NEW TRIAL.
To dismiss action. See APPEAL, 19. PARTIES, 2.
To substitute defendants. See RAILROADS, 8.

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

See DRAINS. ESTOPPEL, 2–5. HIGHWAYS. STREET RAILWAYS, 1–8.

City waterworks system: Proprietary or governmental capacity: Powers of corporation.

1. The main purpose of ch. 231, Laws 1876, was to provide a waterworks system for the city of Eau Claire (*State v. Eau Claire,* 40 Wis. 533), and in operating such system the city acts in a proprietary and not in a governmental capacity, and may, generally speaking, exercise such powers as a private concern engaged in a like business may exercise; and the city could, without direct legislative authority, contract to have another build and operate a dam for waterworks purposes, and could lease the dam and so much of the water power as the city did not need for its own purposes. *Eau Claire Dells Imp. Co. v. Eau Claire,* 240

2. A city, empowered to erect a dam for waterworks purposes, which was expressly authorized to lease the excess water power and the piers, booms, and other structures erected in connection with the dam, can lease the dam itself. *Ibid.*

3. A lease executed by a city in the exercise of its proprietary capacity to operate a waterworks system, which protected the public purposes of the city, is not invalid, though it subsequently appear that it may have been improvident; nor is the lease invalid because it was to extend for a term of ninety-nine years. *Ibid.*

4. Sec. 9, ch. 231, Laws 1876, authorizing an issue of municipal bonds to a stated amount for the construction of the works authorized by the act, is construed not to limit the expenditure for the erection of such works to that amount, so that the municipality was not prohibited from leasing to a corporation which constructed a dam the surplus power in payment for such construction, in addition to delivering to the corporation bonds in practically the full amount limited. *Ibid.*

5. A lease of the dam and surplus power by the city does not violate sec. 10, ch. 231, Laws 1876, requiring money received from the lease of water power to be applied to keeping the works in repair, payment of interest on the bonds, and for the creation of a sinking fund for the redemption thereof, where the lease reserved only a nominal rental, but required the lessee to construct and maintain the dam. *Ibid.*

6. Where a city had leased to a corporation the dam and surplus water power, acquiesced in the building of a mill over the lock required to be maintained by the lease, and not only agreed, but required, the lessee to maintain flash-boards raising the water above the specified height, it could not enforce a forfeiture of the lease because of those violations after they had continued for more than twenty years, *Ibid.*

Paving of street: Power to borrow money.

7. The city of Ashland had the right to borrow money for the pavement of streets where in so doing it did not violate sec. 3, art. XI, Const., prescribing a limitation of indebtedness, or sec. 925—142*a*, Stats., limiting the amount of tax to be raised in a municipality in any one year, though the money so borrowed would exceed twenty per cent. of the levy for such purpose the preceding year, since money used for paving is not borrowed for "ordinary expenses" within the meaning of sec. 7, ch. 14, of the Ashland city charter (Laws 1889, ch. 27), providing that the common council may borrow money to pay the "ordinary expenses" of the city, not exceeding twenty per cent. of the tax levy for the same purpose the preceding year, and since money so borrowed would be used for lawful municipal purposes for which the city is expressly authorized to raise money by taxation. *Miles v. Ashland,* 605

8. Except as limited by charter, statutory, or constitutional provisions a city may borrow money for all lawful municipal purposes; that is, for the purpose of discharging the duties imposed on it directly or by implication by its charter and for which it can raise money by taxation. *Ibid.*

MUTUAL ACCOUNT. See EXECUTORS, 5.

NAVIGABLE WATERS.

See NUISANCES.

Floating bogs: Meandered lake: Artificial lake.

1. A "floating bog" is a mass of grass, reeds, and other aquatic vegetation growing and floating on the water, which may become frozen into the ice in winter, and in high water is carried on the surface and broken off and may be moved by winds and currents to deep water where it disappears as sediment; and its formation in the summer season indicates a substantial amount of water between it and the soil forming the bed of the water. *Att'y Gen. ex rel. Becker v. Bay Boom W. R. & F. Co.* 363
2. A meandered lake, in fact navigable for over twenty years by boats and small water-craft and resorted to by the public for fishing and hunting in boats except when prevented by ice in winter or low water in droughty summer seasons, is navigable water, and the public cannot be enjoined from hunting or fishing thereon; and it is immaterial whether the waters were originally navigable or were made so by artificial agencies. *Ibid.*
3. Land which became submerged by a dam raising the waters of a lake became an extension of the lake, title to the land being in the state, and the public has the right to enjoy the easements of navigation. *Ibid.*
4. Where a considerable part of the expanse inclosed by a dike was navigable water for twenty years or more before such inclosure, neither the defendants nor their predecessors in title had a legal right to destroy or impair the public easement therein through the establishment or operation of a drainage system, under sub. (1), (2), sec. 30.01, Stats. *Ibid.*
5. A federal permit to construct a dike expressly declaring that it granted no property rights or exclusive privileges and that the free public use of the area inclosed was not to be prevented, is construed, in the light of the conditions upon which it was granted, not to vest defendants with the right to continue a dike which encroached upon and injured the enjoyment of the public easements of navigation, fishing, and hunting. *Ibid.*

Riparian owners: Encroachments: Avulsion.

6. A riparian owner's rights to construct embankments are limited, and he may, where necessary to protect his banks against navigable waters, at his peril both of obstructing the public use and as to the necessity, intrude only as far as necessary in such waters; and any other extension upon the bed of such waters is wrongful and vests no right or title in him to continue the same. *Att'y Gen. ex rel. Becker v. Bay Boom W. R. & F. Co.* 363
7. "Avulsion" is a sudden disruption of a piece of ground from one man's land which is carried to another's and which may be followed and identified, as distinguished from that incre-

ment which slowly or rapidly results from floods but which is utterly beyond the power of identification, and particularly from "gradual and imperceptible accretion." *Ibid.*

NEGLIGENCE.

See APPEAL, 11, 15–17. AUTOMOBILES. BANKS, 6–11. CONTRACTS, 9, 10. DRAINS, 2. EVIDENCE, 3, 5. EXECUTORS, 1, 2. HIGHWAYS, 4–6. PHYSICIANS, 5–9. RAILROADS, 1–7. STREET RAILWAYS, 9–15. WORKMEN'S COMPENSATION.

Proximate cause: Unexploded grenades left on testing field.

1. In an action against a rifle-grenade loading company for injuries to a boy when a grenade found in a testing pit by another boy and given to him exploded, the erection of the pit, into which government inspectors shot grenades after inserting detonators, is not the proximate cause of the injury, which resulted not from the character of the testing pit, but from the negligence of the inspectors in failing to collect unexploded grenades. *Zolesky v. Briggs L. Co.* 6
2. Where the loading company, by its contract with the government, was obligated to allow the latter to take from manufactured grenades a sufficient number for testing purposes, which grenades, when selected, ceased to be under control of the company, any negligence in regard to them by government inspectors was not attributable to the company. *Ibid.*

Contributory negligence. See AUTOMOBILES. NEW TRIAL. RAILROADS, 1–7. STREET RAILWAYS, 9, 10, 12, 14.

3. A guest in an automobile who, knowing that the automobile was approaching a railroad track at an excessive rate of speed, failed to remonstrate with defendant, the owner and driver, as to the danger of crossing the track at such speed or to ascertain whether he was keeping a proper lookout, is guilty of contributory negligence barring recovery for injuries received by him. [The question of the liability of a gratuitous carrier to his invited guest in the absence of contributory negligence of the guest, not determined.] *Howe v. Corey,* 537
4. Generally a passenger in an automobile is required to use the same care for his safety that a reasonably careful person exercises under the same or similar circumstances, the extent to which he may rely on the driver for his protection against danger depending on the circumstances of the particular case. *Ibid.*

Assumption of risk: Brakeman boarding moving train.

5. The head brakeman of a freight train who was late for his train and attempted to board it at a place other than the starting point and when it was running at a speed of ten to twelve miles an hour, assumed the risk of injury by being thrown under the car, although the conductor told him to hurry and get on the train. *Ramstrom v. Chicago, M. & St. P. R. Co.* 377

Improvident investments by trust company. See EXECUTORS, 2.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS. See FRAUDS, STATUTE OF, 13.

NEW TRIAL.

See APPEAL, 12, 20. TRIAL, 5.

Affidavit of juror as to effect of special verdict.

An affidavit, on a motion for a new trial, that one of the jurors would not have consented to a special finding of contributory negligence if he had known that it barred recovery, cannot be considered. *Becker v. West Side Dye Works,* 1

NONPARTISAN ELECTIONS. See CONSTITUTIONAL LAW, 3.

NONRESIDENTS. See TAXATION, 16.

NOTICE.

Of assessment. See TAXATION, 21.
Of assignment. See PATENTS, 6.
Of injury. See WORKMEN'S COMPENSATION, 4–6.
Of rescission. See SALES, 16.

NOVATION.

Substitution of debtors by corporation: Burden of proof.

1. Where defendants claim they were released from an obligation and that another debtor was accepted in their stead, they have the burden of proving these facts. *W. C. Zachow Co. v. Grignon,* 449

2. Evidence showing that the president of a corporation had done business with the defendants at various times, that their dealings with the corporation had been through him, that he had taken orders for the corporation, and that he had promised to release the defendants from a debt and accept other debtors, is *held* not to establish a novation where there was no evidence that the president claimed to act for the corporation in making a substitution of debtors and the only direct evidence in the case is that he had no power to make such a substitution. *Ibid.*

3. It is not within the ordinary scope of corporate business for the president to release debtors by substituting his own obligation or that of a partnership of which he is a member; and in this case the act of the president in substituting his own obligation for that of certain debtors of the corporation is *held* too clearly antagonistic to the interests of the corporation to be upheld. *Ibid.*

NUISANCES.

See HIGHWAYS, 6.

Unauthorized acts: Absence of damage.

Where the evidence and the findings of the court disclose that the navigability of a stream is not affected, and no person

has suffered damage, certain acts of the plaintiff in relation to a dam across the stream, although without legislative sanction, are not unlawful, and do not *per se* constitute a nuisance. *Eau Claire Dells Imp. Co. v. Eau Claire,* 240

OFFICERS of corporation. See CORPORATIONS. GUARANTY, 1. NOVATION, 2, 3.

OPINION EVIDENCE. See APPEAL, 13.

OPTION. See FRAUDS, STATUTE OF, 3. INSURANCE, 2. SALES, 13.

ORDINANCES. See PENALTIES. STREET RAILWAYS, 1–8.

OSTEOPATHY. See PHYSICIANS, 1–3.

PARENT AND CHILD. See ACTION, 2. DEEDS, 1. DESCENT, 3, 4. REFORMATION.

PAROL EVIDENCE. See EVIDENCE.

PARTIES.

See TENANCY IN COMMON. WORKMEN'S COMPENSATION, 9–11.

Appearance: Question as to whether plaintiff authorized action.

1. The authority of an attorney to appear for a party is presumed, and the burden of overcoming such presumption is on the party making the denial. *Reinkey v. Wilkins,* 515
2. The question as to whether a plaintiff has authorized the commencement of an action should be raised by a motion to dismiss instead of by an allegation in the answer; but where such question was disposed of by the trial court as if it had been raised by a motion to dismiss, this court will consider it on the merits. *Ibid.*

PARTITION. See JUDGMENT, 3.

PARTNERSHIP.

See CORPORATIONS, 11. FRAUDS, STATUTE OF, 4, 5. NOVATION, 3. TAXATION, 18–21.

What constitutes: Real-estate agents dividing commissions: Sharing losses. See BROKERS, 8.

1. An agreement between real-estate agents to share commissions accruing from the sale of a specific parcel of real estate does not make them partners. *Etscheid v. Tiefenthaler,* 273
2. An agreement whereby a partnership the members of which resided in Wisconsin was to advance forty per cent. of the necessary money and was to have the exclusive control of purchasing, storing, handling, and shipping tobacco, and a partnership the members of which resided in New York was to furnish sixty per cent. of the money and have exclusive control of the sale and disposition of the tobacco, the two firms sharing the profits and losses, creates a partnership under the uniform partnership act (secs. 1724*m*—1 to 1724*m*—38, Stats.) and not a joint adventure. *Westby v. Bekkedal,* 114
3. A partnership has no entity distinct and apart from the persons who compose it. *Ibid.*

PART PAYMENT. See SALES, 3.
PART PERFORMANCE. See FRAUDS, STATUTE OF, 10, 12, 13.
PAR VALUE. See TAXATION, 8.

PATENTS.

Assignment of present and future patents: Validity: Construction.

1. Where plaintiff had a contract with defendant whereby the latter was to assign to plaintiff patents which might be issued to him for inventions relating to paper-feeding mechanism for printing presses, the refusal of plaintiff to assist defendant in developing a subsequent invention of a printing press did not estop it from claiming the right to the patent for the feeding mechanism on the new press because of the fact that the defendant exhibited a model of the new device to plaintiff, where such model showed no invention relating to the feeding and handling of paper and plaintiff had no knowledge that defendant would embody such mechanism in his new press.. *Miller Saw-Trimmer Co. v. Cheshire,* 278
2. A contract whereby the inventor of such paper-feeding mechanism for a particular type of press assigned his patent to another and agreed to assign all future patents he acquired for any paper-feeding mechanism, is not void as contrary to public policy on the ground that the contract is not qualified by place or circumstance, where it is limited to the period of the original patent, extends to particular kinds of inventions only, and does not deprive the public of the benefit of inventive genius in any excepting a specified field. *Ibid.*
3. The assignment of all patents existing or in the future issued for inventions relating to paper-feeding devices to be attached to an existing press of specified type, is *held* not to include a paper-feeding mechanism invented and designed as an integral part of a newly invented press of a different type. *Ibid.*
4. A subsequent contract between the same parties, which was executed for the purpose of carrying out the original intention of the parties to the preceding contract, is based on the consideration for the original contract, so that specific performance thereof will not be refused because later developments disclose that one of the parties should have made a better bargain, where there was no fraud and there was sufficient consideration for the original contract but only nominal consideration for the modification. *Ibid.*
5. Where defendants, in an action for specific performance of a contract to assign patents, counterclaimed asking confirmation of their rights under the patents, but the issues did not present the question of infringement by those patents of patents previously assigned to plaintiff, the court will deny specific performance and not confirm defendants' rights so as to preclude an action for infringement, but will dismiss the counterclaim without prejudice to an action on proper issues to protect defendants' rights. *Ibid.*

Knowledge of assignment by third person.

6. The defendants, who had knowledge of the contract between the inventor and the plaintiff, proceeded at their peril, so far as the rights of the plaintiff were concerned, in developing an invention which related to paper-feeding and handling devices. *Miller Saw-Trimmer Co. v. Cheshire,* 278

PATIENT. See PHYSICIANS AND SURGEONS.

PAUPERS.

See CONTRACTS, 7.

County superintendent of poor: Jurisdiction of county court.

A county having adopted the county system of poor, the right to enforce liability for the support of a pauper is vested in the county superintendent of poor, so that the county court had no jurisdiction to enter a judgment requiring such support in a suit by the supervisors of a town within the county. *Berryman v. Larmer,* 572

PAVING STREETS. See MUNICIPAL CORPORATIONS, 7.

PAYMENT. See ACCORD. SALES, 1.

PENALTIES.

See TAXATION, 23.

Action to enforce: Nature.

1. An action brought on behalf of a county to recover a sum of money as a forfeiture for the violation of a county ordinance fixing the maximum speed of automobiles on county or state highways is a civil action; and a judgment in such action, which is in form and effect one which could properly be entered only in a criminal proceeding, must be reversed. *Kuder v. State,* 141
2. The distinction between a criminal proceeding and a civil remedy to recover a forfeiture is so substantial that a judgment against a defendant in one is no bar to a judgment against him in the other upon the identical state of facts. *Ibid.*
3. The word "guilty" in a judgment in a civil action for collection of a forfeiture does not involve the element of criminality, any more than an adjudication of guilty of negligence in a personal injury case. *Ibid.*

[4. Whether a judgment in a civil action for collection of a forfeiture, which may be brought under sec. 3303, Stats., may, in the absence of a provision to that effect in the ordinance itself, provide for a jail sentence in default of payment of the adjudged penalty under sec. 3302, Stats., not decided.] *Ibid.*

5. An action brought to collect a penalty for the violation of a county ordinance cannot be construed as a prosecution under a penal statute of the state for the violation of which the defendant may be properly committed to jail. *Ibid.*

PERSONAL INJURIES. See AUTOMOBILES. EVIDENCE, 3, 5. NEGLIGENCE. PHYSICIANS, 5–9. RAILROADS, 5–8. STREET RAILWAYS, 9, 10.

PERSONAL PROPERTY. See BAILMENT. BILLS AND NOTES. FRAUDS, STATUTE OF, 12, 13. REPLEVIN. SALES. TAXATION.

PERSONAL REPRESENTATIVES. See EXECUTORS.

PERVERSE VERDICT. See AUTOMOBILES, 14.

PHYSICIANS AND SURGEONS.

See APPEAL, 4. CONTINUANCE. CRIMINAL LAW. EVIDENCE, 4. STATES. WITNESSES, 2, 3.

License: Forms: Osteopathy.

1. Ch. 438, Laws 1915, provides for but two forms of license: one to practice medicine and surgery, the other to practice osteopathy and surgery. A license to practice surgery alone is not authorized. *State ex rel. Pollard v. State Board of Medical Examiners,* 317
2. The preliminary education required by the statute (sec. 1435*a*) of applicants for a license to practice medicine and surgery is not required of applicants for a license to practice osteopathy and surgery, and the board of medical examiners may not refuse to examine an applicant for a license to practice osteopathy and surgery because he has not had the preliminary education required of applicants for a license to practice medicine and surgery. *Ibid.*
3. To constitute colleges of osteopathy reputable within ch. 438, Laws 1915, as amended, it is not necessary that they require of their students a preliminary college course in addition to a high school education. *Ibid.*

Same: Necessity for license: Prescription of family remedies.

4. Sec. 1435*j*, Stats., excepting from the requirement of a license to practice medicine the gratuitous prescribing and administering of family remedies, does not permit engaging in the prescription of family remedies as a business. *Till v. State,* 266

Malpractice: Dentists: Proximate cause: Burden of proof.

5. In an action against a dentist for malpractice, the evidence is *held* insufficient to show that he was negligent in failing to protect the patient's throat, or that his negligence, if any, in failing to discover a filling and particles of a tooth which escaped into plaintiff's lung was the proximate cause of the injury, in that it did not appear that anything more could have been done than was done by the dentist to prevent their escape into her throat if they had been discovered. *Krueger v. Chase,* 163
6. Where it is claimed that the dentist was negligent in failing to discover a filling when examining teeth prior to removing them, it must be proved, and not left to conjecture, that if

the filling had been discovered the operation would have resulted differently. *Ibid.*

7. What would constitute ordinary care on the part of a dentist in removing teeth, to prevent a filling and particles of a tooth from entering the patient's throat, is to be determined by the testimony of experts and not as a matter of common knowledge. *Ibid.*

8. In an action against a dentist to recover for injuries sustained when an electrically driven disk slipped from plaintiff's tooth to the bottom of her mouth, the burden is on the plaintiff to establish that the injury was the result of the negligence of the dentist. *Vale v. Noe,* 421

9. Negligence of the defendant cannot be inferred from the mere fact of injury to the patient, there being no room for the application of the doctrine of *res ipsa loquitur,* as the injury may have been the result of pure accident or of an involuntary movement by the patient; nor could negligence be inferred merely because of defendant's failure to cut off the power from the disk instantaneously with the happening of the accident. *Ibid.*

PLEADING.

See JUDGMENT, 2. PARTIES, 2. WORKMEN'S COMPENSATION, 7, 12.

Counterclaim: Claims arising out of same transaction.

A counterclaim for conversion by plaintiff of goods consigned to him by defendant arises out of the same transaction set forth in a complaint for commission, and was properly pleadable by way of counterclaim under sec. 2656, Stats., as it has been liberally construed. *Cochrane v. Jacob E. Decker & Sons,* 38

Making more definite and certain. See APPEAL, 1.

Complaint. See ACTION. BROKERS, 5. CORPORATIONS, 9.

Answer. See PARTIES, 2.

Demurrer. See ACTION, 2. APPEAL, 18, 19. BROKERS, 6.

Amendment of pleading. See AMENDMENT.

PLEDGE. See SALES, 7.

POOR PERSONS. See PAUPERS.

POSSESSION. See ADVERSE POSSESSION. FRAUDS, STATUTE OF, 7, 9. REPLEVIN, 2.

POWERS. See FRAUDS, STATUTE OF, 4.

PRACTICE of medicine. See PHYSICIANS, 1.

PRESUMPTIONS. See APPEAL, 10, 11. AUTOMOBILES, 11. FRAUDS, STATUTE OF, 6. PARTIES, 1. STREET RAILWAYS, 2. TAXATION, 4, 6. WILLS, 4, 7, 10.

PRICE. See SALES. VENDOR AND PURCHASER, 2.

PRINCIPAL AND AGENT.

See ADVERSE POSSESSION, 1. BANKS, 6. BROKERS. CONTRACTS, 1, 3, 6. CORPORATIONS, 13, 14. FRAUDS, STATUTE OF, 13. NEGLIGENCE, 5. NOVATION, 2, 3. TAXATION, 5, 21.

Agent accepting commissions from third person.

1. It was proper for an employee of an automobile company to accept commissions from a steel company for placing orders from his employer with the steel company, if the employer knew the employee was receiving such commissions; and where the conduct of the employer indicated that it did not require to be informed as to the amount, the employee was not bound to disclose the terms of his commission contract. *Smith v. Crucible S. C. Co.* 308
2. In an action of accounting by the employee to recover commissions, it was improper to limit the accounting to commissions due prior to the commencement of the action, and it should extend to commissions up to the date of trial. *Ibid.*

PRINCIPAL AND SURETY. See CONTRACTS, 9.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 1, 2.

PROBATE OF WILLS. See WILLS.

PROCEDURE in criminal cases. See CRIMINAL LAW.

PROFITS. See TAXATION, 7.

PROMISSORY NOTES. See BILLS AND NOTES.

PROPRIETARY CAPACITY. See HIGHWAYS, 5. MUNICIPAL CORPORATIONS, 1.

PROXIMATE CAUSE. See AUTOMOBILES, 6, 7. NEGLIGENCE, 1, 2. PHYSICIANS, 5, 9. STREET RAILWAYS, 9.

PUBLIC POLICY. See CONTRACTS, 2. PATENTS, 2.

PUBLIC UTILITIES.

See APPEAL, 1. RAILROADS. STREET RAILWAYS.

Power of railroad commission to determine cost of sidetrack: Review.

1. A railroad company that has constructed a spur track for an industry cannot, under ch. 352, Laws 1907, as amended by ch. 481, Laws 1909 (sec. 1797—11*m*, Stats.), maintain an action to recover the cost thereof without first having the railroad commission determine the same in separate items. *Chicago & N. W. R. Co. v. Wis. Zinc Co.* 407
2. The determination of the cost of a spur track under sec. 1797—11*m* is the determination of a pure question of fact that may be delegated to the railroad commission, its action thereon involving no judicial or legislative function. *Union Lime Co. v. Railroad Comm.* 144 Wis. 523, followed. *Ibid.*
3. The review of an order of the railroad commission determining the legitimate cost of a spur track under said sec. 1797—11*m* may be had under sec. 1797—16, being an order fixing a charge for a service rendered by the railroad company. *Ibid.*

Emergency order: Procedure: Review.

4. Sec. 1797*m*—99, Stats., relating to the temporary alteration or suspension of rates of a public utility on account of an emergency, does not require that the railroad commission, in determining whether or not such an emergency exists, shall undertake such an inquest as is required of it in order to establish permanent reasonable rates and adequate service, the commission being given power to act upon its own motion in a summary manner when it deems it necessary to protect the utility business or the interests of the people when they are threatened by emergency conditions of the nature contemplated by the statutes. *La Crosse v. Railroad Comm.* 233
5. When an emergency exists under said sec. 1797*m*—99 requiring a temporary increase in rates, the railroad commission is to exercise its judgment in the matter, and its action is not to be overruled unless it appears that it exceeded its powers or that its acts impose unreasonable or unjust discriminatory burdens on the people or the utility. *Ibid.*
6. An order of the railroad commission of June 30, 1918, increasing the rates which the Wisconsin-Minnesota Light & Power Company could charge for its gas, is *held* an emergency increase of rates under sec. 1797*m*—99 and within the power of the commission to make if in fact an emergency existed. *Ibid.*
7. It is a matter of common knowledge that the cost of labor, supplies, fuel, and other material required to conduct a utility selling gas largely increased during the war period, and that such high prices continue to the present time, necessarily increasing the cost of doing business; and it is *held* that the evidence does not refute the finding of the commission that an emergency existed. *Ibid.*

PUNITIVE DAMAGES. See BREACH OF MARRIAGE PROMISE, 5.

PURCHASER. See VENDOR AND PURCHASER.

QUESTIONS FOR JURY. See AUTOMOBILES, 12. BREACH OF MARRIAGE PROMISE, 1, 5. CONTRACTS, 5. CORPORATIONS, 7. NEGLIGENCE, 5. RAILROADS, 6. STREET RAILWAYS, 12, 14. TRIAL, 1.

QUIETING TITLE. See ADVERSE POSSESSION, 3.

QUO WARRANTO. See CORPORATIONS, 5.

RAILROAD COMMISSION. See APPEAL, 1. PUBLIC UTILITIES, 1.

RAILROADS.

See CORPORATIONS, 3. NEGLIGENCE, 3, 5. PUBLIC UTILITIES, 1–3.

Accidents on station grounds: Open gates: Contributory negligence.

1. Where a wife, who was at a railroad station to meet her husband, on hearing a locomotive whistle walked out on the platform and saw a train in the yards on tracks that were curved so that she could not tell which track it was on, assumed it was coming on the fourth track whereas it was on the first, and was struck when attempting to pass through a gate in a fence between two tracks, without looking in the direction from which the train was coming, her administrator cannot

recover for her death, as she was guilty of contributory negligence as a matter of law in failing to look or listen for a train before entering upon the track. *Jacky v. McAdoo,* 262

2. A traveler is not excused from exercising vigilance to discern whether a track is clear, and cannot assume the absence of danger because a gateway leading to the track is open. *Ibid.*

Accidents at grade crossings.

3. The question whether the driver of a team, who was killed in a collision between his wagon and a trolley car at a railroad crossing, his view being obstructed, was negligent in not stopping and looking, is for the jury. *Worsley v. Johnson,* 325

4. An instruction, in such case, permitting the jury to consider the instinct of self-preservation and the disposition of men in their sober senses to avoid danger, is *held* not to have misled the jury in considering the evidence as to contributory negligence, and was not prejudicial, though the circumstances did not tend to raise the inquiry whether decedent acted recklessly. *Ibid.*

5. An instruction as to the contributory negligence of the driver of a wagon, injured at a railroad crossing, that if the circumstances when he approached the crossing were such as to lead the jury to find that he might well have believed that they gave him an affirmative assurance of safety, it was a circumstance to be considered with all other facts in determining whether he exercised the degree of care ordinarily exercised under the same circumstances, but that he was not excused, because of anything in the circumstances surrounding the crossing, from exercising ordinary care to ascertain whether the track was clear,—is correct. *Gundlach v. Chicago & N. W. R. Co.* 438

6. In an action for injuries to such driver, whose view of the crossing was obstructed and who relied on the fact that the stop signal was in the place where it customarily was when not in use and upon the further fact that the flagman was not present, the question of the contributory negligence of the driver was for the jury.

7. It is a matter of common knowledge and experience that travelers, approaching a railroad crossing at a time when gates or flagmen are ordinarily maintained there, consider the fact of their presence or absence in determining their course of conduct. *Ibid.*

Federal control: Transportation act of 1920.

8. Where recovery in an action against a railway company and the federal director general of railroads was for injuries plaintiff suffered while the railway was under federal control, plaintiff's judgment claim is one to be settled and paid pursuant to the provisions of the Transportation Act of 1920 (41 U. S. Stats. at Large, 456, ch. 91), and the agent designated by the President under that act is substituted as defendant in place of the railway company and the federal director general on the motion of the railway company. *Gundlach v. Chicago & N. W. R. Co.* 438

RAPE.

See WITNESSES, 1.

Declarations prior to alleged offense: Remoteness.

1. In a prosecution for assault with intent to rape, evidence that defendant said that if his wife was ever gone he would "try out" the prosecuting witness (who lived in his home) to see if she was sporty, and that she would either put up quite a fight or do business, is admissible as to the intent of the assault unless too remote in time; and the question whether declarations and threats of a defendant are so remote in time as to lack probative effect is one resting largely, if not entirely, in the discretion of the trial court. *Barber v. State,* 542

2. Testimony that defendant's wife stated to the prosecutrix, after the assault, that she had not intended to return home that night, and that prosecutrix thereupon asked why she had not been told of that fact, was inadmissible even as impeaching testimony because the statements were hearsay, made out of the defendant's presence, and it was not shown that the wife's intention was known to him; and the admission of this evidence is *held* error requiring reversal. *Ibid.*

RATES. See PUBLIC UTILITIES, 4, 7.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See ADVERSE POSSESSION. APPEAL, 20. DEEDS. REFORMATION. TAXATION. TENANCY IN COMMON. TITLE TO REAL PROPERTY. VENDOR AND PURCHASER.

RECORD. See APPEAL, 7–9.

REFORMATION OF INSTRUMENTS.

Contemporaneous oral agreement: Evidence.

A deed conveying property to the grantor's son in consideration of a money payment and a promise to support the grantor for life will not be reformed so as to require the building of a house for the grantor and his wife, where the evidence as to the oral agreement was weak and unsatisfactory and did not specify the kind of house to be built. *Kuchera v. Kuchera,* 108

REHEARING. See APPEAL, 6.

RELEASE.
Of debtor. See NOVATION.
Of lien. See MECHANICS' LIENS, 1, 2.

RENT. See LANDLORD AND TENANT. TAXATION, 17.

REPEAL. See STATES.

REPLEVIN.

Failure of sheriff to make return.

1. In replevin the sheriff's failure to file plaintiff's papers within twenty days after taking the property as required by sec. 2728, Stats., is not ground for dismissal of an action, where

defendant was not injured by the delay, such delay not operating to divest the court of jurisdiction. *Behling v. Posorske,* 608

Confusion of goods: Damages.

2. In a replevin action to recover possession of forest products, where plaintiff's property had been wrongfully commingled with that of defendant because of a mistake as to the boundary line between the properties, defendant was entitled to a return of his property remaining after plaintiff's claim was satisfied, and upon inability to return such property was entitled to a judgment for its value without damages for its seizure under the writ of replevin. *Behling v. Posorske,* 608

Goods seized on execution: Title.

3. Findings of the trial court that plaintiff, the owner of a department store, contracted with several persons to conduct sales in his store, and that they, without the knowledge of plaintiff, having attempted to incorporate, purchased goods under their purported company name, and, being unable to make settlement with plaintiff, surrendered the goods then in the store, including those purchased by them and not paid for; that the plaintiff settled with mercantile creditors whose goods came into the store and the proceeds from which he received; and that he later purchased at an execution sale all the interest of the corporation in the goods, being amply sustained by the evidence, a judgment in an action for replevin awarding the goods to the plaintiff as against the sheriff, who had seized them under an execution against the company, is proper. *Brill v. Ryan,* 600

RES ADJUDICATA. See JUDGMENT.

RESCISSION. See CORPORATIONS, 7, 9. SALES, 11–14, 16.

RES GESTÆ. See EVIDENCE, 3–5.

RES IPSA LOQUITUR. See AUTOMOBILES, 8. PHYSICIANS, 9.

RESTRAINING ORDER. See INJUNCTION.

REVIEW. See APPEAL. PUBLIC UTILITIES, 3, 5.

REVOCATION OF WILL. See WILLS, 5–8. WITNESSES, 5.

RIPARIAN RIGHTS. See NAVIGABLE WATERS, 6.

ROADS AND STREETS. See AUTOMOBILES. CONTRACTS, 8–10. DRAINS, 1, 2. EVIDENCE, 1. HIGHWAYS. PENALTIES, 1. RAILROADS, 3–7. STREET RAILWAYS.

RULES OF COURT.
Supreme Court Rule 6 (Printed case), 334, 344.
Supreme Court Rule 44 (Costs and penalties), 334, 344, 622, 625.

SALES.

See BAILMENT, 2. CONTRACTS, 2. EVIDENCE, 2. PLEADING. REPLEVIN, 3. TAXATION, 5.

Construction of contract: Price to be fixed by seller: Validity.

1. A written contract for the handling by plaintiff of defendant's products which permitted plaintiff to order from defendant

any quantity of goods he desired, and for which plaintiff was to pay the prices fixed by defendant, retaining anything secured above such prices, clearly and unambiguously provides for the payment of the prices at which defendant billed the goods to plaintiff, so that parol evidence by plaintiff as to the meaning of prices was properly excluded. *Cochrane v. Jacob E. Decker & Sons,* 38

2. Where the parties dealt with each other for several months under a contract requiring plaintiff to account for goods consigned to him at defendant's prices, and there was considerable correspondence in which plaintiff expressed dissatisfaction with defendant's prices but did not claim that the price was to be determined in any other way, the course of dealing indicated that the plaintiff was to pay for the goods at the prices at which they were billed by defendant. *Ibid.*

Same: Sale on condition: Breach: Damages. See BAILMENT.

3. A contract for the sale of a motor truck to the owner of five shares of stock in the corporation manufacturing the truck, with provisions relative to the seller's taking such stock in partial payment, is construed to mean that the buyer was not bound to accept and pay for the truck unless and until there had been a sale by the seller of the five shares of the stock transferred by the buyer, out of which sale $500 was to be retained on account of the purchase of the truck, and the balance made available to the buyer to apply on the price at the time fixed for its delivery. *Kuhn v. Wagner,* 223

4. The subsequent act of the buyer of the truck in attaching a sight draft on the seller to a notice to the company of the sale of the stock sent to him for signature by the seller and thereby demanding payment, is not such an act as entitles the seller to treat the contract as broken by the buyer; the seller of the truck, through his act in transferring the stock absolutely to a third person, being precluded from asserting a breach by the buyer. *Ibid.*

5. The buyer of the truck, in such case, is entitled to recover, upon breach by the seller, the difference between the value of the stock when the agreement was made and its value at the time of the trial of the action. *Ibid.*

Implied condition that seller will effectuate transfer: Sale of corporate stock. See BILLS AND NOTES, 1. CORPORATIONS, 6–9. FRAUDS, STATUTE OF, 12, 13.

6. In a sale of corporate stock it is an implied condition that the seller will give the requisite notices to the corporation and take the necessary steps to properly transfer title to the buyer. *Kuhn v. Wagner,* 223

7. The pledgee of the corporate stock in this case is bound by the conditions appearing on the face of the stock and by the recitals in his contract with the pledgor. *Ibid.*

Implied warranties: New machine: Waiver.

8. Where a contract for the sale of a machine was in writing which contained no express warranties, parol evidence was

inadmissible to show a verbal warranty; and because of sub. (4), sec. 1684*t*—15, Stats., there was no implied warranty that a specially named engine would develop a particular horse-power or that it was suitable for any purpose. *Fox v. Boldt,* 333

9. Where a machine is ordered from a dealer in machinery there is an implication that the order is for a new machine, and the contract could not be satisfied by the delivery of a used, second-hand, or rebuilt machine. *Ibid.*

10. Under sec. 1684*t*—15, Stats., where one orders from a dealer a specified machine, there is an implied warranty on the part of the dealer that the machine shall be new. *Ibid.*

11. Even though the purchaser accepted the machine and waived his right to rescind the contract, he was nevertheless entitled to damages for the breach of a warranty that the machine was a new one, and was entitled to a verdict as to the amount which should be applied in diminution or extinction of the purchase price, under sec. 1684*t*—69, Stats. *Ibid.*

12. The fact that the purchaser of a tractor, after abandoning it about Thanksgiving Day, tried it out in the following spring on a disk to see if it would do ordinary farm work, with a view of making a proposition to buy it and seeing what it was reasonably worth, did not show an acceptance of the tractor or a waiver of the right to rescind the contract for breach of an implied warranty that the tractor was new. *Ibid.*

13. The purchaser of a machine must exercise his option to rescind with promptness on the discovery of a defect which constitutes a breach of warranty. *Ibid.*

14. A purchaser of a machine impliedly warranted to be new was entitled to suspend judgment on the question as to whether or not it was new, so long as the seller was endeavoring to make it perform the work which a new one might reasonably be expected to perform, and he was under no obligation to rescind until that time. *Ibid.*

Acceptance of goods: Rescission.

15. Where defendant bought a plant consisting of a separator and other equipment which was to be installed in its cheese factory as a unit, the fact that defendant hauled the separator to its factory and received and retained other machinery for a considerable time did not amount to an acceptance, as, under sub. 2, sec. 1684*t*—19, Stats., title did not pass until the stipulated installation was completed. *Sliter v. Creek View Cheese Factory,* 639

16. Installation of such plant having been unreasonably delayed through no fault of defendant, it was entitled to rescind by giving reasonable notice of its intention so to do in case installation was not made by a specified time. *Ibid.*

SATISFACTION. See ACCORD AND SATISFACTION.

SCHOOLS AND SCHOOL DISTRICTS.

See CERTIORARI, 2.

Consolidated rural school district: Formation: Amendment of petition on certiorari.

1. A consolidated rural school district, which is different from the ordinary school district and has other powers, such as furnishing transportation to pupils, can be created only by holding an election of the voters of the district sought to be consolidated as provided by sec. 40.15, Stats. 1919; sec. 40.01 providing merely for the consolidation of ordinary school districts. *State ex rel. McDiarmid v. Knight,* 138
2. Where petitioners wanted a consolidated rural school district so as to provide for transportation of pupils and to have a graded school, and the petition was directed to and acted upon by officers who had no power to create a consolidated rural school district as requested, but did have authority to consolidate school districts into an ordinary school district, the court cannot on *certiorari* amend the petition and all subsequent proceedings to show the consolidation of districts and not the creation of a consolidated rural school district. *Ibid.*

SEALS. See ASSIGNMENTS.

SECRET PROFITS. See JOINT ADVENTURERS.

SEDUCTION. See BREACH OF MARRIAGE PROMISE.

SERVICES. See ACCORD. DESCENT, 1, 2. EXECUTORS, 3, 5. FRAUDS, STATUTE OF, 6. TENDER.

SETTLEMENT. See WORKMEN'S COMPENSATION, 12.

SHERIFFS. See REPLEVIN, 1, 3.

SPECIAL ADMINISTRATOR. See EXECUTORS, 4.

SPECIAL VERDICT. See APPEAL, 10, 11, 15–17. CONTRACTS, 5. TRIAL, 2.

SPECIFIC PERFORMANCE. See FRAUDS, STATUTE OF, 10. PATENTS, 4, 5.

SPUR TRACK. See PUBLIC UTILITIES, 1–3.

STATE HISTORICAL SOCIETY. See WILLS, 17–19.

STATE OFFICERS. See ESTOPPEL, 4.

STATES.

See ESTOPPEL, 2. NAVIGABLE WATERS. WORKMEN'S COMPENSATION, 11.

Attorney general. See ATTORNEY GENERAL.

Medical examiners: Compensation. See PHYSICIANS, 2.

Sub. 7, sec. 1436, Stats. 1915, fixing the maximum compensation of members of the state board of medical examiners at $10 per day, is not affected or repealed by sec. 20.44, Stats. 1917, fixing such maximum at $5, passed by the legislature to reenact sub. 47, sec. 170, ch. 12, Stats. 1913, under the mistaken assumption that such law was in force. *State ex rel. Lotz v. Hull,* 126

STATE TREASURER. See BANKS, 3.
STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTES.

See ATTORNEY GENERAL, 1, 3. EXTRADITION.

Validity. See CONSTITUTIONAL LAW, 3.

Enactment: Bill changed before governor's signature.

1. If the substitution of the word "or" for the word "and" in a bill as passed by the legislature when it was presented for the governor's signature was a material change, the bill approved by the governor was not the one passed by the legislature and is a void enactment. If the word "or" be construed to mean the same as "and," then there is no material change, and, in either event, the enactment worked no change in the law in that particular. *State ex rel. Pollard v. State Board of Medical Examiners,* 317

Construction. See ATTORNEY GENERAL, 2. BANKS, 1, 2, 7. BILLS AND NOTES, 1. BROKERS, 1–3, 6. CONSTITUTIONAL LAW, 1, 3. CORPORATIONS, 10. DESCENT, 3, 4. DIVORCE, 3. DRAINS, 1. EXTRADITION, 1. FRAUDS, STATUTE OF, 2, 4, 12. HIGHWAYS, 1–4. JUDGMENT, 3. MUNICIPAL CORPORATIONS, 1, 4, 5, 7. PARTNERSHIP, 2. PENALTIES, 4. PHYSICIANS, 1–4. PLEADING. PUBLIC UTILITIES, 1–6. SALES, 8, 10, 11, 15. SCHOOLS, 1. STATES. STREET RAILWAYS, 1, 3. TAXATION, 3, 5, 15, 17–24. WILLS, 16. WITNESSES. WORKMEN'S COMPENSATION, 4–8, 10–12.

Same: Enlarging or restricting meaning of words.

2. Sec. 4971, Stats., requiring that in the construction of statutes all words and phrases shall be construed and understood according to the common and approved usage of the language, does not prevent the court from enlarging or restricting the meaning of a particular word or words where that becomes necessary in order to give effect to a plainly declared legislative purpose. *Estate of Spooner,* 174

3. It is not the office of a court to extend a statute by construction where there is no express legislative intention to guide it. *Ibid.*

STIPULATION. See APPEAL, 2, 20.

STOCK. See CORPORATIONS. EXECUTORS, 8. FRAUDS, STATUTE OF, 12, 13. SALES, 6, 7. TAXATION, 7–13.

STOCK DIVIDEND. See TAXATION, 8, 13.

STOCKHOLDERS. See CORPORATIONS. TAXATION, 7, 10–12, 17.

STREET RAILWAYS.

See AUTOMOBILES, 1. PUBLIC UTILITIES. RAILROADS, 3.

Franchises: Annual payment to city: Validity: Indeterminate permit.

1. Under sec. 1863, Stats., as it existed in 1903, it was within the power of a city to refuse to grant any privilege to an interurban railway to enter upon and use its streets; and where the

city incorporated in a franchise granted to such a corporation a term requiring payment of $35,000 in thirty-five annual instalments, and such franchise was accepted by the railway company, such condition became as much a part of the ordinance as did the privilege exercised by the railway company in using the streets. *Oshkosh v. Eastern Wis. E. Co.* 85

2. It not clearly appearing from the pleadings, it will not be presumed that the provision for an annual payment was a revenue-producing measure rather than compensation for the wear and tear on the bridges and streets of the city, and therefore the provision will not be treated as one beyond the power of the common council to impose. *Milwaukee v. Milwaukee E. R. & L. Co.* 147 Wis. 458, and *Milwaukee E. R. & L. Co. v. Milwaukee,* 167 Wis. 384, distinguished. *Ibid.*

3. The procuring of an indeterminate permit on the surrender, under sec. 1797*t*—3, Stats., by an interurban railway of a franchise granted in 1903 by a city under sec. 1863, requiring payment of $35,000 in thirty-five annual instalments as compensation for using the streets, did not relieve the railway company of the obligation to pay such instalments. *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, and *Wisconsin T., L., H. & P. Co. v. Menasha,* 157 Wis. 1, distinguished; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, followed. *Ibid.*

Same: Construction: Cutting sidewalk lines.

4. A street railway franchise ordinance authorizing and requiring the extension of railway lines when the city limits are extended, and providing that the franchise should thereafter apply to the "operation" of those lines, permits the construction of turnouts, sidetracks, and switches along the extended lines. *State ex rel. Milwaukee E. R. & L. Co. v. Braman,* 131

5. Where such a franchise also authorized the construction of either single or double tracks along the specified streets, it authorized the construction of a single track along the part of the street controlled by the city when the corporate limits on one side only of the street were extended. *Ibid.*

6. While in some cases ordinances granting franchises to utilities are to be strictly construed, they are not to be construed so strictly as to defeat the purpose for which the grant is made. *Ibid.*

7. A street railway franchise to lay tracks in the street authorizes the cutting of the sidewalk lines, though they are not strictly in the streets, if that is reasonably necessary to proper construction of the tracks. *Ibid.*

8. Where a franchise ordinance authorized the construction of turnouts, sidetracks, and switches, the consent of the common council to the plans for such construction is not necessary in the absence of a requirement for such consent. *Ibid.*

Accidents: Collision with automobiles: Negligence: Contributory negligence.

9. In an action by a minor for injuries sustained in a collision between an automobile and defendant's street car, the evi-

dence is *held* to show that defendant was negligent in starting its car around a curve at a street intersection without warning and without keeping a proper lookout of an unobstructed view and that such negligence was a proximate cause of the injury; and also to require a finding that plaintiff's mother, driving the automobile, was contributorily negligent in attempting to cross the track in view of the approaching street car. *Gulesserian v. Madison Rys. Co.* 400

10. Under the circumstances, the contributory negligence of the mother is not imputable to the child so as to preclude recovery by the child against the street railway company for the injury. *Prideaux v. Mineral Point,* 43 Wis. 513, distinguished. *Ibid.*

11. In the first cause of action in this case, which was to recover for damages to two motor trucks struck by a street car when the drivers were attempting to clear the track after passing another vehicle, the evidence is *held* to justify a finding of the jury that the street car was negligently operated, though there were no street crossings in the vicinity and no ordinance regulating the rate of speed. *Speakes L. & C. Co. v. Duluth St. R. Co.* 475

12. Where the drivers of the trucks saw an approaching street car about 1,100 feet away but believed they had time to pass, and did pass, a horse and wagon going in the same direction, by turning onto the track on which they were struck, their contributory negligence was a question for the jury. *Ibid.*

13. In the second cause of action in this case, to recover for damages to a motor truck struck by a street car when the truck was on the track area entered in order to pass another vehicle approaching from the opposite direction, the evidence is *held* to justify a finding of negligence on the part of the motorman. *Ibid.*

14. The driver of a motor truck who saw an approaching street car, believed he had time to pass another vehicle and started to do so, and was struck by the car before he had come fully on the track and when still twenty-five feet in front of the vehicle which he intended to pass, is guilty of contributory negligence as a matter of law. *Ibid.*

15. The admission of testimony of the truck drivers that in turning onto the track they believed they had time to make the turnouts with safety and without interfering with street cars, is not prejudicial error in view of the other testimony in the case. *Ibid.*

STREETS. See ROADS AND STREETS.

SUBCONTRACTORS. See MECHANICS' LIENS.

SUBSCRIBERS TO STOCK. See CORPORATIONS, 10–12.

SUMMARY AFFIRMANCE. See APPEAL, 19.

SUMMARY PROCEDURE. See PUBLIC UTILITIES, 4.

SUPERVISORS. See HIGHWAYS, 1–3. PAUPERS.

SUPPLEMENTAL RETURN. See APPEAL, 9.

SUPREME COURT. See APPEAL.

SURGEONS. See PHYSICIANS AND SURGEONS.
SURRENDER.
Of contract. See CONTRACTS, 6.
Of franchise. See STREET RAILWAYS, 3.
SURVIVORSHIP. See WILLS, 11, 12, 16.

TAXATION.

See DRAINS, 3. MUNICIPAL CORPORATIONS, 7.

Assessment: Of real property: Improvements for special purpose.

1. The statutory rule that property shall be assessed "at the full value which could ordinarily be obtained therefor at private sale" requires that property shall be assessed with reference to purposes for which it may be sold rather than the purposes to which it presently may be devoted. *State ex rel. Oshkosh Country Club v. Petrick,* 82
2. In assessing the real estate of a country club for purposes of taxation, money expended in improving the property for golf purposes should not be considered, but it must be appraised with reference to its value for farming purposes. *State ex rel. Gisholt Machine Co. v. Norsman,* 168 Wis. 442, distinguished. *Ibid.*

Same: Of machinery in leased building.

3. Under secs. 1035, 1043, Stats. 1919, machinery placed within a building by a tenant for trade or manufacturing purposes is not a "fixture," and therefore not assessable as real property to the owner of the building. *State ex rel. Cramer v. Bodden,* 64

Same: Of personal property: Disputed ownership: Determination.

4. Where a tax assessor found a carload of whisky consigned to a wholesale liquor dealer, his determination that the whisky belonged to and was assessable to the dealer was presumptively correct and could be overturned only by some direct evidence impeaching it, so that the dealer's statement before the board of review that title did not pass to him until he had paid for the liquor was insufficient to impeach the assessor's determination, such statement being but a conclusion of the dealer. *State ex rel. Mackmiller v. Bousley,* 613
5. Packages of whisky in the warehouse of a wholesale liquor dealer, ready for shipment and addressed to parties residing outside the state, should not have been assessed to the dealer as agent, but as owner, since under sec. 1684*t*—46, Stats., title thereto did not pass from the dealer until delivery to the railroad company; but where the whisky was properly assessable to him as owner, he cannot, on *certiorari* to reverse the decision of the board of review, complain that it was assessed to him as agent. *Ibid.*

Income taxes: Profit on sale of corporate stock.

6. Upon *certiorari* to review the assessment of an income tax the presumption is that the decision of the board of review is

correct; and if upon any reasonable view of the evidence it will support the decision it cannot be disturbed, for the weight or credibility of the evidence cannot be reviewed. *State ex rel. Howe v. Lee,* 381

7. The excess of the selling price of corporate stock over its value January 1, 1911, would measure the profit subject to an income tax to the corporation, or to the stockholders thereof where the corporation paid no income tax thereon; and relator, a stockholder, would be required to pay such proportion of the total tax as his shares bear to the total shares. *Ibid.*

8. Where the market value of corporate assets on January 1, 1911, was the par value of its stock, and additional stock issued by the company was dividend stock, issued out of profits, going to swell the value of its corporate assets, of which the stockholder relator received his due share, this, together with his other stock, represented his proportionate share of the corporate assets for the purpose of estimating income tax. *Ibid.*

9. The actual and not the book value of corporate stock governs for income-tax purposes, and the amount of the corporate debt, if any, should be added to the market value of the stock to ascertain the value of corporate assets; and in the absence of debt the market value of the stock measures the value of the corporate assets, or at least is competent evidence thereof. *Ibid.*

10. In a proceeding to assess income tax of a corporate stockholder, the fact that such holder on a sworn appraisal fixed the value at eighty per cent. in 1909 and that another stockholder had appraised stock in the estate of a director of the corporation at par in 1911, in the absence of corporate debt is *held* admissible evidence to show that the stock was of par value on January 1, 1911. *Ibid.*

11. In case of a sale of corporate stock partly for cash and partly for other corporate stock, if the property exchanged is valued at a price substantially corresponding to its market value, such price will govern in fixing the stockholder's income-tax assessment, where there is no contrary evidence of value. *Ibid.*

12. Where a stockholder paid no more than par for any of his stock, the fact that he bought some after January 1, 1911, when the stock was at par, is immaterial, because its increase from the time of purchase to the time of sale would be measured by the excess of the sale price over par in fixing his income-tax assessment. *Ibid.*

13. In determining the income from profits on sale of corporate assets, the fact that stock dividends represented shares in the company sold is immaterial where the par value of such shares was deducted and the income tax on only the excess sale price was imposed, no income tax thereon having been paid either by the corporation or by the relator stockholder. *Ibid.*

Same: Income on trust administered in Wisconsin: Waiver.

14. The provisions of a testamentary trust directing that a designated Wisconsin trust company act as trustee, and in case of its refusal another Wisconsin trust company be appointed, that the trust funds be invested in securities which the laws of Wisconsin permit trustees to invest in, and that the county court of Milwaukee county or its successor fill vacancies in the trustees, clearly indicate that the testator intended the trust to be administered in Wisconsin. *State ex rel. Wis. Trust Co. v. Phelps,* 147

15. Where a Wisconsin trust company, administering a trust in Wisconsin, consented to a Pennsylvania corporation paying dividends at Philadelphia to a beneficiary of the trust residing in that city, receipts being signed by the beneficiary and forwarded to the Wisconsin trust company, the trustee crediting the income account of the trust estate with the amount paid to such beneficiary and debiting the same account with the amount when the receipt of the beneficiary was received, and accounting to the county court for the amount so credited and debited, the transaction constituted in law a payment of the income to the Wisconsin trust company, and such income was "received" by the Wisconsin trust company within the meaning of sub. 3, sec. 1087*m*—2, Stats., and was properly assessed for income taxation. *Ibid.*

16. Where an income taxpayer did not claim exemption in his return, but opposite the place for exemptions for the taxpayer wrote "None," and the same word opposite the exemption as to children, he waived his claim that the assessment against him was invalid because contravening sec. 1, amendm. XIV, Const. U. S., in that the income tax law grants no exemptions to nonresidents while it does to residents. *Ibid.*

17. Where the property of a corporation consisting of mines and lands in Michigan was transferred to trustees resident of Wisconsin, each beneficiary being a stockholder of the corporation and having the same interest under the trust agreement as he had in the corporation, and the rents received by the trustees after payment of expenses being paid to the beneficiaries, the money so received was not taxable under sub. 3, sec. 1087*m*—2, and sub. 5, sec. 1087*m*—10, Stats. 1919. *State ex rel. Mariner v. Hampel,* 67

Same: Income of partners residing within and without the state.

18. The word "income," as used in sub. 3, sec. 1087*m*—2, Stats., is to be given the same meaning it has in every-day language, and is a profit or gain derived from capital or labor, or both combined; and in determining the income of a partnership it is necessary to deduct from the gross proceeds of sales the expenses, cost of purchasing, storing, handling; and shipping. *Westby v. Bekkedal,* 114

19. Where it was provided by an agreement between a Wisconsin partnership and a New York partnership that all sales were

to be made out of the state, the partnership "resided" equally within the state of New York and the state of Wisconsin within the meaning of sec. 1087*m*—22, Stats., relating to the situs of income for taxation purposes. *Ibid.*

20. Under the agreement the income belonging to the Wisconsin partnership was taxable in this state under sub. 3, sec. 1087*m*—2, Stats., and the portion of the income apportioned to the New York firm was income derived partly from property and business within the state of Wisconsin and partly from business transacted without the state, and should have been allocated. *Ibid.*

21. The Wisconsin partnership was the agent of the New York partnership in making a return for purposes of the income tax, and the New York firm is estopped to dispute the assessment where it failed to appear before the board of review, under sec. 1087*m*—18, Stats., although the New York firm was not notified of the return or that an assessment was made. *Ibid.*

Action to collect income tax: Offset: Penalty: Interest.

22. Under sec. 1087*m*—26, Stats., defendants in an action to recover income tax are entitled to offset personal property taxes and have the same deducted from the amount of income tax found due. *Westby v. Bekkedal,* 114

23. The penalty prescribed by sec. 1090, Stats., in the event that a tax is not paid within the time prescribed becomes a part of the tax and payable with it. *Ibid.*

24. Under sec. 1126, Stats., such income tax bore interest at the rate of twelve per cent. per annum from the 1st day of January until the entry of judgment in an action to recover the same. *Ibid.*

TENANCY IN COMMON.

See JUDGMENT, 2-4.

Authority of one cotenant to protect interest of another.

Where one cotenant had left his papers with another cotenant, his sister, and had instructed her to protect his interest in proceedings affecting the common property then being considered, the sister had authority four years thereafter, without having seen her brother in the meantime, to authorize an attorney to represent him in an action against a third cotenant for waste. *Reinkey v. Wilkins,* 515

TENDER.

See ACCORD. INSURANCE, 5. VENDOR AND PURCHASER.

Sufficiency.

There being evidence to support the finding of the trial court that services were rendered at the request of defendant, and the services admittedly done by authority being worth the sum asked, an offer of less than the amount due is not good as a tender. *Haddow v. J. L. Owens Co.* 391

TERMINATION of contract. See CONTRACTS, 5–7.
TESTAMENTARY CAPACITY. See WILLS, 1, 3.
TESTAMENTARY CLASS. See WILLS, 10, 11.
TITLE.
To land. See ADVERSE POSSESSION. CONTRACTS, 1. DEEDS. DESCENT, 3, 4. FRAUD. FRAUDS, STATUTE OF, 2–11. MUNICIPAL CORPORATIONS, 1–6. NAVIGABLE WATERS, 3. TAXATION. VENDOR AND PURCHASER. WILLS.
To personal property. See ASSIGNMENTS. BAILMENT. BILLS AND NOTES. CORPORATIONS, 3. DESCENT, 1. PATENTS. REPLEVIN. SALES. TAXATION. WILLS.
TORTS. See BANKS, 6, 7, 9–11. BREACH OF MARRIAGE PROMISE. NEGLIGENCE. NUISANCES. PHYSICIANS, 5–9. RAILROADS, 1–7. REPLEVIN, 2. TENANCY IN COMMON.
TOWNS. See HIGHWAYS, 1, 3. PAUPERS.
TRANSPORTATION of pupils. See SCHOOLS.
TREASURY STOCK. See CORPORATIONS, 3.

TRIAL.

Appearance. See PARTIES.
Right to speedy trial. See APPEAL, 18, 19.
Stipulations. See APPEAL, 2, 20.
Waiver of jury trial.
1. Where the jury in rendering a special verdict answered all except one question submitted to it, a motion to direct a verdict, made after such special verdict had been received, is not a waiver of the right to a jury trial as to such question. *Behling v. Posorske,* 608
Continuance: Grounds. See CONTINUANCE.
Objections. See APPEAL, 4.
Exceptions. See APPEAL, 5, 9.
Evidence. See EVIDENCE.
Instructions to jury. See INSTRUCTIONS TO JURY.
Special verdict: Instructions on particular questions. See APPEAL, 10, 11, 15–17. CONTRACTS, 5.
2. Where a special verdict is submitted, the court should give specific instructions applicable to the particular question, so that there can be no doubt as to which question the instructions apply. *Becker v. West Side Dye Works,* 1
Instructions as to burden of proof. See CORPORATIONS, 8. NOVATION, 1. PARTIES, 1. PHYSICIANS, 8.
3. It was not prejudicial error to give an instruction that where a party has the burden of proof he must establish the truth of the proposition involved not only by a preponderance of the evidence, but must satisfy the jury of the existence of the fact in controversy. The instruction given substantially follows the rule expressed in *Anderson v. Chicago Brass Co.* 127 Wis. 273, and does not authorize the jury to follow its own prejudice or caprice in determining the questions at issue. *Speakes L. & C. Co. v. Duluth St. R. Co.* 475

Deliberation by jury.

4. Testimony not objected to at the trial may be considered by the jury. *John v. Pierce,* 44
5. Where no prejudice appears in a verdict, the fact that one of the jurors signed an affidavit that other jurors referred to plaintiff as a Jew, a crook, and a liar cannot form the basis for a reversal or for a new trial. *Becker v. West Side Dye Works,* 1

Perverse verdict. See AUTOMOBILES, 14.

Conjectural verdict. See PHYSICIANS, 6.

Reduction of damages. See BREACH OF MARRIAGE PROMISE, 5.

Judgment. See JUDGMENT.

Vacation of judgment. See DIVORCE, 1.

Trial after remittitur. See APPEAL, 20.

TRUNK HIGHWAYS. See DRAINS, 1, 2. HIGHWAYS, 4–6.

TRUST COMPANIES. See BANKS. EXECUTORS, 1, 2. TAXATION, 15.

TRUSTS. See COURTS, 4. DIVORCE, 3. FRAUDS, STATUTE OF, 4. JOINT ADVENTURERS. TAXATION, 14, 15, 17. WILLS, 17, 19.

UNIFORM COUNTY GOVERNMENT. See CONSTITUTIONAL LAW, 2, 3.

UNITED STATES. See EXTRADITION. NAVIGABLE WATERS. NEGLIGENCE, 1, 2.

USAGES. See EVIDENCE, 2.

UTILITIES. See PUBLIC UTILITIES.

VACATION OF JUDGMENT. See DIVORCE, 1.

VENDOR AND PURCHASER.

See ADVERSE POSSESSION, 1. CONTRACTS, 1. DEEDS. FRAUD.

Contract of sale: Merchantable title: Abstracts.

1. Where a memorandum of sale specified that abstracts of title should be furnished, a merchantable title was impliedly to be tendered before the purchase money could be demanded. *Russell v. Ives,* 123
2. Where a vendor notifies a purchaser that he will not perform the contract of sale, the purchaser is under no obligation to make a tender of the price, *Ibid.*

VESTED RIGHTS. See CONSTITUTIONAL LAW, 1.

WAIVER.

Of defense. See BREACH OF MARRIAGE PROMISE, 2.
Of incompetency of witness. See WITNESSES, 2.
Of invalid assessment. See TAXATION, 16.
Of lien. See MECHANICS' LIENS, 1, 2.
Of forfeiture. See INSURANCE, 3–5. MUNICIPAL CORPORATIONS, 6.
Of jury trial. See TRIAL, 1.
Of objection. See APPEAL, 6. CORPORATIONS, 9. DEEDS, 1. TRIAL, 4.

WARRANTY. See CORPORATIONS, 13, 14. SALES, 8–11.

WASTE. See JUDGMENT, 2–4. TENANCY IN COMMON.

WATERS. See MUNICIPAL CORPORATIONS, 1–6. NAVIGABLE WATERS. NUISANCES.

WILLS.

See DESCENT. EXECUTORS. TAXATION, 14, 15.

Contract to make a will. See FRAUDS, STATUTE OF, 6.

Probate: Wills of nonresidents. See COURTS, 3, 4.

Same: Proof: Competency of witnesses. See APPEAL, 4. WITNESSES, 4, 5.

Testamentary capacity: Insane delusion as to wife's fidelity.

1. In a wife's contest of her husband's will on the ground that the husband, at the time of executing the will, was laboring under an insane delusion that the wife had been unfaithful, statements in the will that testator had wrongfully accused his wife of infidelity and that he regretted having made accusations are insufficient, under the evidence, to warrant the court in setting aside a finding that the husband had been laboring under such delusion at the time of making the will. *Will of Shanks,* 621

2. Where the wife, prior to the husband's execution of the will, had for more than fifty years been a faithful wife and had helped him to accumulate his property, his will, executed under an insane delusion as to the wife's fidelity, which left her almost nothing for support in her old age, was properly refused probate, it being reasonably certain that but for such delusion she would have received a materially larger share of the estate. *Ibid.*

3. The test as to the validity of a will executed by one laboring under an insane delusion is not whether testator had general testamentary capacity, but whether the insane delusion materially affected his will. *Ibid.*

Revocation of will: New testamentary disposition not effectually made.

4. If a testator cancels or destroys a will with the present intention of making a new disposition of his property, and the proposed new disposition fails to be carried into effect, the presumption in favor of a revocation by the canceling is repelled, and the will stands as originally made. *Will of Marvin,* 457

5. Where testatrix left all her property to one of four grandchildren, and after her death the will was found to have pencil marks through the words bequeathing the property to such grandchild, and below the attestation clause there was written with a pen a clause in the handwriting of the testatrix giving all her property, after payment of all her debts, to an orphans' home, but such clause was not signed by testatrix nor witnessed, the attempted changes did not become effective and the will remained as originally drawn. *Ibid.*

Same: Failure to find will: Declarations of testator.

6. On appeal in a will case involving the question whether or not a will had been revoked by its destruction by decedent, due deference must be given to the opinion of the trial court as to the weight and credibility of evidence given by witnesses in his presence. *Will of Oswald,* 345

7. Where it is established that testatrix properly executed a valid will and that the same was last known to be in her possession but cannot be found on her death, a *prima facie* presumption arises that she destroyed it with the intention of revoking it. *Valentine's Will,* 93 Wis. 45, followed. *Ibid.*

8. Declarations of the testatrix that she had destroyed her will and had sold and given away everything she had, and directions to a witness as to whom she wanted him to give certain things, were competent as tending to prove that deceased died in the belief that she left no will, and thus support a presumption of revocation arising from the fact that the will was last seen in her possession and could not be found after her death. *Ibid.*

Construction of will: Testamentary class: Vesting of estate.

9. In the absence of proof as to surrounding facts and extrinsic circumstances, in construing a will the court will ascertain the testator's intention from the language of the will alone and not by any supposed intent; and precedents and rules of construction are less helpful in construing wills than in construing other writings which, owing to statutes or custom, are more uniform. *Will of Griffiths,* 630

10. While the fact that testator specified in his will the names of beneficiaries may not raise a conclusive presumption that it was not his intention to create a testamentary class, it is a strong circumstance tending to such conclusion in the absence of language more clearly describing a class. *Ibid.*

11. A will giving testator's wife a life estate in the residue of his estate and providing that on her death the property should be divided equally "between such of my brothers and sisters and the brothers and sisters of my wife as are hereinafter named," without words of survivorship, does not create a testamentary class to consist of such of the brothers and sisters of testator and his wife as were named in the will and alive at the time of the death of the wife, but vested a future estate in the named brothers and sisters at the time of the death of testator. *Ibid.*

12. A mere direction by testator to divide after a life estate does not prevent a present grant or postpone the vesting beyond the death of the testator. *Ibid.*

13. Inconvenience that may be caused by the construction given the will by the trial court will not be considered, since construction should not be affected by subsequent events; and in doubtful cases the law leans in favor of an absolute rather than a defeasible estate and favors an early vesting of estates. *Ibid.*

14. In a proceeding to construe a husband's will, brought by the administratrix of the wife, who had been given a life estate in the residue of the husband's property, to ascertain to whom such residue should be given on the death of the wife, the fact that only one of the legatees joined the administratrix in an appeal from the judgment of the county court did not preclude the appellate court from reversing the judgment as

to other legatees, since the administratrix represented such legatees and since the court did not lose jurisdiction to construe the will by failure of some of the interested parties to appeal. *Ibid.*

15. In a proceeding to construe a will the court has jurisdiction not only to determine its meaning but to direct the administratrix *de bonis non* as to her duties in the distribution of the estate. *Ibid.*

16. Under sec. 2289, Stats., on the death of a legatee during the lifetime of the testator the legatee's children were entitled to his share. *Ibid.*

Same: Vesting of trust estate: Payment of annuity.

17. Under a will making specific bequests and giving the residue of the estate to trustees to manage and pay an annuity to testator's son for life, and if he marries an annuity to his wife, and if she survives him the two annuities to her till she dies or remarries, and in case the son dies leaving issue giving the residue to them, and directing that the trusts shall cease on such payments being made, but if the son die without issue giving the residue to a society, and directing that on the vesting in the society of the residue the trust shall cease,—the trust, in the latter contingency, ceases as to all the residue, and the estate vests, with right of possession, in the society, subject to payment of the widow's annuities, the direction for payment by the trustees being directory merely, the chief object being to place the *corpus* of the estate in the society on the happening of the contingency stated. *State Historical Society v. Foster,* 155

18. A society which is authorized by its charter to hold and manage property and to receive it by devise or gift can receive property by devise or gift subject to a reasonable lawful condition, such as paying an annuity, even if the society is not authorized to act as trustee, payment not being the performance of a trustee duty. *Ibid.*

19. The society taking the estate subject to a charge of an annuity fulfils the mandate of the will that it use the income for purposes for which the society was organized when it uses all the income over and above the charge for such purposes. *Ibid.*

Costs: Probate by one named executor.

20. In a proceeding to probate a will by one named executor, wherein the executor merely sought to sustain the will by such competent testimony as was obtainable, it was improper for the county court, in disallowing probate of the will, to adjudge costs in the county court against the proponent, he having merely performed his duty. *Will of Shanks,* 621

Same: In proceedings to construe will.

21. The good faith and propriety of litigation for the construction of a will as to when a testamentary trust ceases not being questionable as to either party, each is entitled to payment of his taxable costs in the supreme court, to be paid out of the trust estate. *State Historical Society v. Foster,* 155

WITNESSES.

See APPEAL, 4. EVIDENCE.

Privileged communications: Husband and wife.

1. Under sec. 4072, Stats. 1915, as amended by ch. 433, Laws 1917, making a husband and wife competent witnesses for or against the other, except that neither one, without the consent of the other, shall disclose a "private" communication, statements by a husband to a wife as to the occurrence out of which a prosecution for assault with intent to rape arose are inadmissible, the amendment, by substituting "private communications" for "confidential communications," having restricted rather than enlarged the class of communications which may be inquired into. *Barber v. State,* 542

Competency of witness: Physicians: Waiver by patient's representatives.

2. Sec. 4075, Stats., prohibiting a physician from testifying as to information acquired professionally from a patient, was enacted for the benefit of the patient, and the protection or privilege accorded the patient thereby may be waived by him; but it cannot be waived by administrators, executors, or personal representatives of the patient or by a beneficiary under his insurance policy. *Maine v. Maryland C. Co.* 350

3. In an action on an accident policy which involved the question whether the death of the insured was the result of an accident, the testimony of physicians who attended him is incompetent, under sec. 4075, the protection of such statute not having been impliedly waived by the insured on taking out the policy merely because of the possibility of the need of such testimony in an action on the policy following the death of the insured. *Ibid.*

Transactions with deceased persons: Legatees.

4. Under sec. 4069, Stats., relating to transactions with deceased persons, an interested witness could not testify that the deceased burned the will in her presence in a basin procured by such witness for the deceased. *Will of Oswald,* 345

5. The husband of an interested party in a will contest is competent, under sec. 4072, Stats., to testify in favor of his wife concerning the destruction of the will by decedent. *Ibid.*

WORDS AND PHRASES.

Accretion. See NAVIGABLE WATERS, 7.
Adverse party, in statute. See page 563.
Avulsion. See NAVIGABLE WATERS, 7.
Child, in statute. See DESCENT, 4.
Commission, in statute. See page 399.
Counties, in statute. See page 434.
Employee, in statute. See WORKMEN'S COMPENSATION, 1.
Fixture, in statute. See TAXATION, 3.
Floating bog. See NAVIGABLE WATERS, 1.
Fugitive from justice. See page 37.
Guilty, in judgment. See PENALTIES, 3.
Income, in statute. See TAXATION, 18.

WORDS AND PHRASES—con.
Navigable water. See NAVIGABLE WATERS, 2.
Negotiable paper, in statute. See BILLS AND NOTES, 1.
Official action, in statute. See HIGHWAYS, 3.
Operation, in ordinance. See STREET RAILWAYS, 4.
Ordinary expenses, in city charter. See MUNICIPAL CORPORATIONS, 7.
Parent, in statute. See DESCENT, 4.
Received, in statute. See TAXATION, 15.
Reputable, in statute. See PHYSICIANS AND SURGEONS, 3.
Resided, in statute. See TAXATION, 19.
Unavoidable accident, in instruction. See APPEAL, 17.
Waiver. See page 256.

WORKMEN'S COMPENSATION.

See ATTORNEY GENERAL, 3, 4.

Who are employees: Workman transferred to new employer.

1. Where an employee of an excavation contractor consented to be transferred to the service of a gas company laying pipe in ditches dug by the contractor, and was injured while working for the gas company and under its sole control, the gas company, and not the contractor, was liable for compensation under sub. (2), sec. 2394—3, sub. (2), sec. 2394—4, and sub. (2), sec. 2394—7, Stats. 1915, he being an "employee" of the gas company under an implied contract of employment, within the common-law rule, though he continued to work for the contractor one hour a day and was continued on his pay-roll. [Whether the workman might look to either the contractor or the company for compensation, not decided.] *Cayll v. Waukesha G. & E. Co.* 554
2. A finding of the industrial commission on the question of the relationship sustained by a workman to parties to whom he was transferred is not conclusive where the evidence is undisputed, the question in such case being one of law. *Ibid.*
3. Where the electric lights of a village failed, and the superintendent of the company furnishing power instructed his wife by telephone to have some one repair the trouble and suggested she procure one L., a former employee of the company, it is *held* that the direction to procure L. was advisory only, and one H., whom the wife engaged, became an employee of the company and under the workmen's compensation act, so that his administrator could not recover in an action at law for death which occurred while he was engaged in repairing a broken transmission wire. *Heitt v. Wisconsin-Minnesota L. & P. Co.* 393

Notice of injury: Form: Notice to foreman.

4. Where an employer has notice within thirty days that an accident has happened and that some injury has resulted to an employee by reason thereof, he has the knowledge that it was intended by sec. 2394—11, Stats., should be brought home to

him by the service of written notice. Such notice should describe the nature of the injury as fairly as possible under the circumstances existing at the time the notice is given. *Frank Martin-Laskin Co. v. Goetsch,* 548

5. A foreman's knowledge of an injury to an employee is not notice to the employer within sec. 2394—11; and where the employer is a corporation, this requirement can be satisfied only by service on a managing officer. *Ibid.*

6. Knowledge of a foreman concerning an accident does not take the place of the statutory notice unless it is shown that the knowledge of the foreman was communicated to the employer; and under sec. 2394—11 failure to give the employer personal notice of an injury will bar recovery unless the industrial commission finds as a fact that there was no intention to mislead the employer and that he was not in fact misled by failure to give the notice. *Ibid.*

Same: Waiver: Payment of funeral expenses.

7. An employer, by paying the funeral expenses of a deceased employee under sub. (4) (d), sec. 2394—9, Stats. 1915, to an administrator on the supposition that the deceased employee left no dependents, is not estopped from pleading a want of the notice required by sec. 2394—11, barring a right to compensation if no notice is given, and no "payment of compensation" made within two years from the date of the accident. The payment of funeral expenses is not a payment on account of compensation. *Manteufel v. Jenkins,* 565

Election by employee: Medical benefits.

8. In view of the circumstances of the case, acceptance by the injured employee during some weeks of medical, surgical, and hospital services from his employer is *held* not to have constituted an election under the workmen's compensation act (sec. 2394—25, Stats.), the question in each case being one of intention. *Harloff v. Merwin,* 30

Action to review award: Alien property custodian as party.

9. The court obtains no jurisdiction to review an award of the industrial commission under the workmen's compensation act unless an action is commenced for that purpose within twenty days after the date of the award, in which the adverse party, namely, the person in whose favor an award is made, shall be made a defendant. *Milwaukee-Western F. Co. v. Industrial Comm.* 561

10. Where an award under the compensation act for the death of an alien enemy was made payable to the alien property custodian under the federal Trading with the Enemy Act—40 U. S. Stats. at Large, 411, ch. 106, sec. 7 (c),—a nonresident infant dependent of the deceased employee was not the "adverse party" required to be made a defendant to an action by the employer to review the award. The alien property custodian has title to the award which was made in his favor, and is the adverse party in an action to test its legality,

the alien dependent being a proper but not a necessary party to the action. *Ibid.*

11. Where, without authorization of the governor, the attorney general brought an action in the circuit court to review an award of the industrial commission in a case in which the state was interested, and the governor failed to direct him to bring the action until more than twenty days from the date of the order or award, the circuit court was without jurisdiction of the action, notwithstanding a *nunc pro tunc* direction of the governor to the attorney general to bring the action, and a motion to dismiss should have been granted. *Hammond-Chandler L. Co. v. Industrial Comm.* 163 Wis. 596, distinguished. *State v. Snyder,* 415

Same: Amendment of complaint.

12. Under sec. 2394—19, Stats., an employer, suing to set aside an award of the industrial commission, could at the trial amend his complaint by setting up as an additional ground certain matter relating to a settlement by the injured employee with a third person whose negligence caused his injuries. *Harloff v. Merwin,* 30

WRIT OF REPLEVIN. See REPLEVIN, 1, 2.

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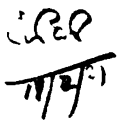
WRIT OF REPLEVIN. See REPLEVIN, 1, 2.